2006 SIXTH CIRCUIT JUDICIAL CONFERENCE

Thursday, May 18, 2006

"Reasonable Sentencing"
after *Booker*

STATEMENT ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and Distinguished Members of the Committee,

I am pleased to be here today on behalf of the Judicial Conference and its Criminal Law Committee to discuss developments in federal sentencing since the Supreme Court's decision in *United States v. Booker*.[1] My testimony today will explain why federal sentencing practices today remain about the same as they were before *Booker*. Accordingly, there is no need for any immediate action or "*Booker* fix" legislation. In particular, the Judicial Conference opposes a system of "topless" guidelines because it is not appropriate and would create grave risks of unsettling the system and it opposes mandatory minimum sentences. The Criminal Law Committee does, however, believe that some narrow areas may deserve consideration for possible legislation to improve the system – including restoring the traditional composition of the Sentencing Commission (a goal supported by the Conference), expanding judges' ability to impose supervised release and award restitution, eliminating unjustified mandatory minimum sentences, reducing the disparities in penalties for crack and powder cocaine, and encouraging the Sentencing Commission to undertake a comprehensive review of the current sentencing regime.

My testimony is divided into four parts. Part I reviews the data on federal sentences in the wake of *Booker*. The average sentence length before *Booker* was 57 months; the average sentence length after *Booker* was 58 months – showing, if anything, a slight increase in sentence severity. Moreover, there has not been a dramatic change in the percentage of cases falling outside the Federal Sentencing Guidelines after *Booker*. Even taking the critics own narrow view

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[1] 125 S.Ct. 738 (2005).

of the appropriate measure of change – focusing narrowly on cases in which judges varied from the Guidelines – more than 90% of all cases are being resolved in the same way as they were before Booker.

Part II reviews the way in which federal appellate courts – including the United States Supreme Court – should be able to clarify important aspects of the new sentencing regime and reduce any disparities that have occurred in the immediate aftermath of *Booker*. Already the appellate courts are beginning to provide guidance on what is a "reasonable" sentence, the standard of appellate review mandated by *Booker*. As the circuits speak, it is to be expected that judge-to-judge and district-to-district variation will be reduced. And, of course, once the United States Supreme Court speaks on the subject, a clear law of the land will be set that will help bring uniformity to the system.

Part III reviews one alternative that has been urged as replacement for the current system: so-called "topless" Guidelines. Legislation adopting such a scheme would run the risk of disrupting the entire federal criminal justice system. The constitutional viability of the topless guidelines scheme hinges on the continuing validity of the Supreme Court's 5-4 decision in *Harris v. United States*[2] allowing judicial fact-finding at the bottom end of Guideline ranges. Since then, of course, the Court has handed down its opinion in *Booker (*and with several other similar earlier cases). These decisions affirm the importance of juries in criminal sentencing in ways that were not fully appreciated before. Many observers believe that *Harris* is no longer good law. If this is true, the constitutionality of any topless Guidelines scheme is certainly in

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[2] 536 U.S. 545 (2002).

question. To restructure the entire federal sentencing system on such constitutionally debatable foundations is a gigantic gamble.

Part IV explains that while there is no need for sweeping change, Congress may be able to draft narrow legislation in several specific areas that could improve the current sentencing process. In particular, Part IV presents for discussion some particular topics, including:

A. Restoring the Sentencing Commission to its traditional composition of "no less than" three federal judges;

B. Encouraging the Sentencing Commission to codify a standardized methodology for determining sentences, such as the three-step process currently recommended by the Commission;

C. Evaluating ways in which downward sentence reductions for substantial assistance are handled by judges *and* prosecutors;

D. Evaluating current procedures for appellate review;

E. Giving judges greater power to extend terms of supervised release for released offenders;

F. Authorizing judges to prevent criminals from profiting from their crimes;

G. Expanding the power of judges to award full and fair restitution to crime victims;

H. Repealing irrational mandatory minimum sentences;

I. Reducing the unsupportable disparities between the penalties for distributing crack cocaine versus powder cocaine;

J. Providing financial support for "boot camp" programs for certain non-violent, first offenders;

K. Improving community release as a way of transitioning offenders back into their communities; and

L. Encouraging the Sentencing Commission to undertake a comprehensive evaluation of the federal sentencing structure in the wake of *Booker*.

I am here today as the Chair of the Judicial Conference's Criminal Law Committee.[3] Our Committee is composed of distinguished judges from around the country, namely Judge Lance M. Africk (Louisiana Eastern), Chief Judge Donetta W. Ambrose (Pennsylvania Western), Judge Julie E. Carnes (Georgia Northern), Chief Judge William F. Downes (Wyoming), Judge Richard A. Enslen (Michigan Western), Chief Judge Jose Antonio Fuste (Puerto Rico), Judge David F. Hamilton (Indiana Southern), Judge Henry M. Herlong, Jr. (South Carolina), Judge Nora Margaret Manella (California Central), Judge Norman A. Mordue (New York Northern), Judge Wm. Fremming Nielsen (Washington Eastern), Judge William Jay Riley (Eighth Circuit), Magistrate Judge Thomas J. Rueter (Pennsylvania Eastern), and Judge Reggie B. Walton (District of Columbia).

Of course, the formal views of the judiciary on legislation must be made by the Judicial Conference. Because this hearing does not involve specific pending legislation, the Judicial Conference has not had an opportunity to give any final view on what kind of congressional action might be appropriate. Accordingly, my remarks today represent only the views of the members of the Criminal Law Committee about the general topic areas that we understand to be under general consideration. Because no specific legislation is pending, our thoughts are

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[3] I serve as a federal district court judge for the U.S. District Court for the District of Utah, having been nominated by President Bush in 2001 and confirmed by the Senate in 2002. I also continue to be a Professor of Law at the S.J. Quinney College of Law at the University of Utah, where I teach courses on crime victims' rights and criminal procedure. After graduating from law school in 1984, I clerked for then-Judge Antonin Scalia of the U.S. Court of Appeals for the District of Columbia and Chief Justice Warren Burger of the U.S. Supreme Court. I then served for two years as an Associate Deputy Attorney General in the United States Department of Justice during the Reagan Administration and for three-and-a-half years as an Assistant United States Attorney in the Eastern District of Virginia.

necessarily preliminary – in the nature of thoughts for further discussion. Moreover, our Committee, whatever its views, serves only in an advisory capacity to the Judicial Conference and may not speak on its own for the judiciary. If Congress moves to consider specific legislation on sentencing practices, the Criminal Law Committee will be happy to review it and make appropriate recommendations to the Judicial Conference, which then may comment formally on the judiciary's behalf.

I. *Booker* Has Not Caused Much Change in Federal Sentences.

Since the Supreme Court's decision in *United States v. Booker*, the most notable fact about the federal system is how little things have changed. The most comprehensive data on federal sentencing practices comes from the United State Sentencing Commission, which has been carefully compiling data on *Booker*'s effects.[4] The most telling statistic is that sentences today are, on average, about the same (if not slightly longer) as compared to sentences before *Booker* (and its predecessor, *Blakely v. Washington*). Before *Blakely*, the average federal sentence was 57 months; after *Booker*, the average federal sentence was 58 months.[5] This stable pattern recurs across the four most significant categories of federal prosecutions:

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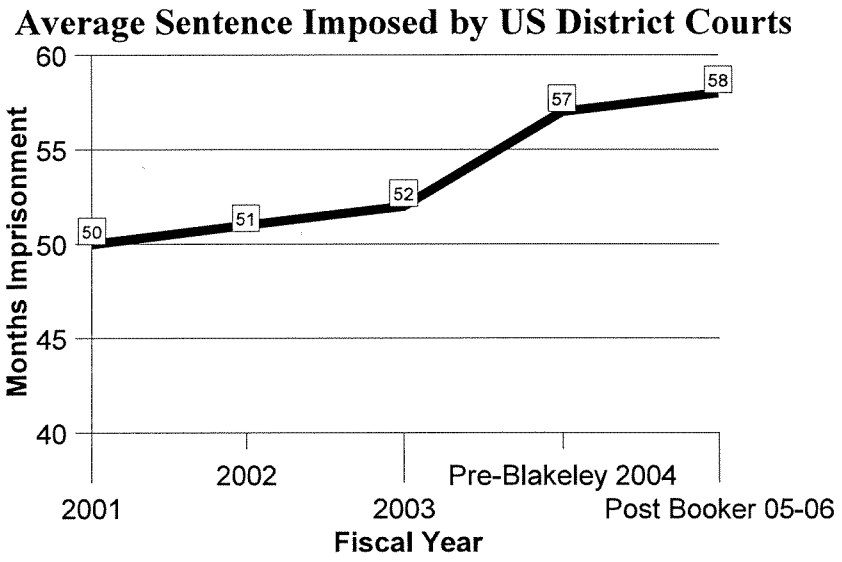
[4] U.S. SENTENCING COMMISSION, REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON SENTENCING (Mar. 2006) (hereinafter *BOOKER* IMPACT REPORT).

[5] *BOOKER* IMPACT REPORT, *supra*, at 71.

AVERAGE SENTENCE IMPOSED

	Pre-*Blakely*	Post-*Booker*
Drug Trafficking	83 months	85 months
Unlawful Entry	29 months	27 months
Firearms	61 months	60 months
Theft/Fraud	20 months	23 months
ALL CASES	57 months	58 months

In sentencing, outcomes matter. Viewed from a nationwide perspective, aggregate sentencing outcomes remain basically unchanged after *Booker* (and have even increased slightly), as shown in the following chart.



Source: United States Sentencing Commission Data
Prepared by: The Administrative Office of the U.S. Courts

Apparently some observers view the issue not from the perspective of overall sentencing outcomes but rather from the perspective of the frequency of downward variances from the Guidelines. From a policy perspective, this approach can be less helpful, because each individual variance has to be judged by the facts of the particular case. Even taking this approach, however, there appears to be little need for immediate legislative action.

We understand that some observers claim that the case for congressional intervention is demonstrated by the following data collected by the Sentencing Commission:[6]

Position of Sentence Relative to Guideline Range	**FY2001**	**FY2002**	**FY2003**	**FY2004 (Pre-Blakely)**	**FY2005-06 (Booker)**
Within Range	64.0%	65.0%	69.4%	72.2%	62.2%
Upward Departures	0.6%	0.8%	0.8%	0.8%	0.3%
Otherwise Above Range	–	–	–	–	1.3%
Substantial Assistance Departure	17.1%	17.4%	15.9%	15.5%	14.4%
Other Gov't Sponsored Departures	–	–	6.3%	6.4%	9.3%
Other Downward Departure	18.3%	16.8%	7.5%	5.2%	3.2%
Otherwise Below Range	–	–	–	–	9.3%

[6] *BOOKER* IMPACT REPORT, *supra*, at D-10.

Observers critical of the current system apparently focus on the last two categories – "other downward departure" and "otherwise below range" – and contend that these are new, post-*Booker* reductions in sentences that are inappropriate.

This table reveals, if anything, that the system has not changed much after *Booker*. For starters, it is possible that at least some of the data reflecting court-initiated departures may actually include government-sponsored departures. But assuming the accuracy of the data and taking them in historical perspective, the system in 2005-06 was almost exactly the same as it was in 2001. In 2001, about 64% of sentences fell within the Guidelines; in 2005-06, about 62% of sentences fell within the Guidelines. The 2% difference is quite small and may well be attributable to the increase in government-sponsored departure motions, such as new "fast track" programs for immigration cases. (The Commission's data entry system before 2003 prevents further exploration of this possibility.)

Even taking a narrow, single-year view of the data, the system in 2005-06 was not very different than in 2004 before *Blakely* and *Booker*. In 2005-06, 62.2% of sentences were within the Guidelines, compared to 72.2% in 2004 – a difference of 10.0%. One way of viewing this difference is as follows:

Additional Upward Departures/Variances	0.8%[7]
Additional Government-Sponsored Departures	1.8%[8]
Additional Downward Departures/Variances	7.3%[9]
Total Difference after *Booker*	9.9%[10]

The critics of the current system apparently focus on the 7.3% of the cases in which there was an additional downward adjustment of the sentence. Against a backdrop of 0.8% more upward adjustments after *Booker* (and the Department's own decision to sponsor 1.8% more downward departures after *Booker*), this change does not appear significant. Put directly – even taking the critics own narrow view of the appropriate measure of change, *more than 90% of all cases are being resolved in the same way as they were before* Booker. And how much did the sentences change in the 7.3% of cases with a downward adjustment of some type? Here again, the Sentencing Commission's data suggest no basis for substantial concern. The median decrease in sentence was only 12 months.[11]

Finally, it must be remembered that in each of these cases a sentencing judge, after carefully considering all relevant sentencing information and the particular facts of the case, has

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[7] 1.3% "otherwise above the range" + 0.3% "upward departures" after *Booker*, compared to 0.8% upward departures before *Booker/Blakely*.

[8] 14.4% substantial assistance departures + 9.3% other gov't sponsored departures after *Booker*, compared to 15.5% substantial assistance departures + 6.4% other gov't sponsored departures before *Booker/Blakley*.

[9] 3.2% "other downward departures" + 9.3% "otherwise below range" after *Booker*, compared to 5.2% "other downward departures" before *Booker/Blakely*.

[10] Total not quite 10.0% because of rounding. For the underlying data, see *BOOKER* IMPACT REPORT, *supra*, at D-10.

[11] *BOOKER* IMPACT REPORT, *supra*, at D-25.

concluded that downward variance from the Guidelines is appropriate. The possibility that conscientious sentencing judges reached the right result in most of these cases should not be hastily dismissed. We also believe (based on anecdotal report from our colleagues around the country) that the majority of these variances have been given in cases that did not involve violent and repeat offenders. After *Blakely* and *Booker*, DOJ officials publically suggested that the toughest federal sentences should be directed toward violent and repeat offenders.[12] Similarly, Attorney General Gonzales during his confirmation hearings in January 2005 asserted that prison is best "for people who commit violent crimes and are career criminals," and he also stressed that a focus on rehabilitation for "first-time, maybe sometimes second-time offenders ... is not only smart, . . . it's the right thing to do."[13] In Attorney General Gonzales' words, "it is part of a compassionate society to give someone another chance."[14] When carefully examined, the facts of many of these variance cases seem likely to fit comfortably within the approach described by the Attorney General.

In light of all these points, it appears that there is no need for an immediate "*Booker* fix," especially if the fix carries its own substantial risks and costs.

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[12] *See* Testimony of Ass't Attorney General Chris Wray to Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives at 8-9 (Feb. 10, 2005) (stressing that most federal prisoners "are in prison for violent crimes or had a prior criminal record before being incarcerated"); *see also* Letter to the Editor from Dan Bryant, Assistant Attorney General for Legal Policy at the Justice Department, WASH. POST, Dec. 24, 2005, at A25 (asserting that "[t]ough sentencing makes Americans safer by locking up repeat and violent offenders").

[13] *See* Transcript, Senate Judiciary Committee's hearings on the nomination of Alberto Gonzales, available at Professor Douglas Berman's excellent and indispensable website, http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/gonzales_hearin.html.

[14] *Id.*

II. The Appellate Process Should Be Allowed to Operate.

Even if the critics believe that the existing data demonstrate a problem in the system, it seems appropriate to wait before recommending dramatic legislative action. The data reflect the immediate attempts by trial courts around the country to put into effect *Booker*'s mandates. It would hardly be surprising to discover in the first year following a significant new Supreme Court decision invalidating important parts of the federal sentencing statute that efforts of district judges in 94 districts had produced a few rough edges. Those rough edges will disappear over time as experience develops with the new system.

Of particular importance is the ability of appellate courts – including the United States Supreme Court – to clarify important aspects of the new sentencing regime. Already the appellate courts are beginning to provide guidance to trial courts on what is a "reasonable" sentence after *Booker*.[15] As the circuits speak, it is to be expected that judge-to-judge and

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[15] *See, e.g., United States v. Cooper*, --- F.3d ---, 2006 WL 330324 (3d Cir. Feb. 14, 2006) (noting that "while [appellate courts] review for reasonableness whether a sentence lies within or outside the applicable guidelines range, . . . it is less likely that a within-guidelines sentence, as opposed to an outside-guidelines sentence, will be unreasonable"); *United States v. Richardson*, --- F.3d ---, 2006 WL 318615 (6th Cir. Feb. 13, 2006) (explaining that the Sixth Circuit has established a rebuttable presumption of reasonableness where a defendant is sentenced within the appropriate Guidelines range); *United States v. Williams*, --- F.3d ---, 2006 WL 250058, at *1 (7th Cir. Feb. 3, 2006) (noting that "a sentence within the guidelines range will rarely be unreasonable"); *United States v. McMannus*, --- F.3d ---, 2006 WL 250240, at *2 (8th Cir. Feb. 3, 2006) (stating that "the farther the district court varies from the presumptively reasonable guidelines range, the more compelling [its] justification [must be] based on the § 3553(a) factors"); *United States v. Godding*, 405 F.3d 125, 127 (2d Cir. 2005) (per curiam) (vacating a sentence of probation because of concern that "the brevity of the term of imprisonment imposed by [the] sentence [did] not reflect the magnitude of the theft"); *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005) ("A discretionary sentencing ruling . . . may be unreasonable if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence

district-to-district variation will be reduced. And, of course, once the United States Supreme Court speaks on the subject, a clear law of the land will be set that will help bring uniformity to the system. Obviously the Justice Department is in a good position to help secure that uniformity, as the Solicitor General's Office must have dozens and dozens of cases currently pending involving *Booker* issues. If the concern is clarity of existing legal standards, the Justice Department should be encouraged to ask for Supreme Court review of an appropriate case on the subject.

In the last few months, the appellate courts have been generally moving in the direction of forcing district courts into great compliance with the Guidelines. As Professor Douglas Berman has noted, "it seems all post-*Booker*-*within*-guideline sentences and nearly all above-guidelines sentences are being found reasonable, whereas many *below*-guideline sentences are being reversed as unreasonable."[16] As he catalogued the state of appellate court decisions just two weeks ago, the pattern is as follows:

Within-guideline sentences: No court of appeals has yet reversed a within-guideline sentence as unreasonable. Many courts have affirmed within-guideline sentences as reasonable; there are too many such cases to list.

Above-guideline sentences: Only one court — the Seventh Circuit, in the 2005 case of *United States v. Castro-Juarez*[17] — has reversed an above-guideline sentence as unreasonable. A number of cases, however, have affirmed above-guideline sentences as reasonable. These

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that lies outside the limited range of choice dictated by the facts of the case.").

[16]Douglas Berman, Sentencing Law and Policy: Tracking Reasonableness Review Outcomes (Mar. 3, 2006), http://sentencing.typepad.com.

[17]425 F.3d 430 (7th Cir. 2005).

include *United States v. Fairclough*,[18] *United States v. Smith*,[19] *United States v. Larrabee*,[20] *United States v. Jordan*,[21] *United States v. Winters*,[22] and *United States v. Shannon*.[23]

Below-guideline sentences: Thirteen cases involving below-guideline sentences have been reversed as unreasonable. These are: *United States v. Myers*,[24] *United States v. Gatewood*,[25] *United States v. Shafer*,[26] *United States v. Claiborne*,[27] *United States v. Eura*,[28] *United States v. Moreland*,[29] *United States v. Duhon*,[30] *United States v. McMannus*[31] (which reversed two sentences in one opinion), *United States v. Feemster*,[32] *United States v. Clark*,[33] *United States v. Pho*,[34] *United States v. Coyle*,[35] and *United States v. Saenz*.[36] By Professor Berman's tabulation, only a handful of cases where the defendants' sentences were below the guidelines ranges have been affirmed as reasonable. *United States v. Montgomery*[37] and *United States v. Williams*[38] were

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[18]— F.3d —, No. 05-2799-CR, 2006 WL 465367 (2d Cir. Feb. 17, 2006).
[19]— F.3d —, No. 05-30313, 2006 WL 367011 (5th Cir. Feb. 17, 2006).
[20]436 F.3d 890 (8th Cir. 2006).
[21]435 F.3d 693 (7th Cir. 2006).
[22]416 F.3d 856 (8th Cir. 2005).
[23]414 F.3d 921 (8th Cir. 2005).
[24]— F.3d —, No. 05-1543, 2006 WL 488411 (8th Cir. Mar. 2, 2006).
[25]— F.3d —, No. 05-1865, 2006 WL 452902 (8th Cir. Feb. 27, 2006).
[26]— F.3d —, No. 05-2049, 2006 WL 453200 (8th Cir. Feb. 27, 2006).
[27]— F.3d —, No. 05-2198, 2006 WL 452899 (8th Cir. Feb. 27, 2006).
[28]— F.3d —, No. 05-4437, 2006 WL 440099 (4th Cir. Feb. 24, 2006).
[29]— F.3d —, No. 05-4476, 2006 WL 399691 (4th Cir. Feb. 22, 2006).
[30]— F.3d —, No. 05-30387, 2006 WL 367017 (5th Cir. Feb. 17, 2006).
[31]436 F.3d 871 (8th Cir. 2006).
[32]435 F.3d 881 (8th Cir. 2006).
[33]434 F.3d 684 (4th Cir. 2006).
[34]433 F.3d 53 (1st Cir. 2006).
[35]429 F.3d 1192 (8th Cir. 2005).
[36]428 F.3d 1159 (8th Cir. 2005).
[37]No. 05-1395, 2006 WL 284205 (11th Cir. Feb. 7, 2006).
[38]435 F.3d 1350 (11th Cir. 2006).

the only two cases that Professor Berman could find after *Booker*.

Put simply, circuit courts are not showing undue deference when reviewing below-guideline sentences. Moreover, post-*Booker* cases are only now resulting in rulings that provide feedback to district courts on the meaning of reasonableness. Interestingly, the two latest post-*Booker* data runs from the United States Sentencing Commission show a slight up-tick in the number of nationwide within-guideline sentences: the total *post-Booker* within-guidelines sentences are up to 62.2% as of March, up from 61.9% in February and from 61.2% in January Although this by itself may not be a statistically significant change, one might speculate that the notable trend of appellate court reasonableness review could be leading district judges to adhere more often to the guidelines in some cases. In light of these decisions, there is every reason to expect that, over time, appellate review will produce greater compliance with the Guidelines.

We also understand critics of the current system to be concerned about whether existing appellate review will have sufficient "traction" to ensure that the congressional purposes of sentencing are achieved. Indeed, it is possible that in the hearing today, critics may point to individual sentences of individual judges as demonstrating the need for system-wide reform.

If the concern is a downward adjustment in any particular case, the appropriate remedy is obvious: the Justice Department can file an appeal. As just noted, the Justice Department has had considerable success in challenging below-Guideline sentences. On the other hand, pursuing a dramatic change such as a topless guidelines scheme poses considerable risks both of unsettling the system and requiring thousands of resentencings of in-custody defendants.

III. A System of Topless Guidelines Creates Grave Risk of Disrupting the Entire System.

If the Congress were to adopt a system of topless guidelines, it would run the risk of disrupting the entire federal criminal justice system. Observers of the current system, including the Justice Department, apparently all agree that the constitutional viability of the topless guidelines scheme hinges on the continuing validity of *Harris v. United States*.[39] In that 5-4 decision from 2002, the Supreme Court agreed that judges rather than juries could undertake fact-finding in connection with mandatory minimum sentences. Since then, of course, the Court has handed down its opinions in *Blakely* and *Booker*. These decisions affirm the importance of juries in criminal sentencing in ways that were not fully appreciated before.

In the wake of *Blakely* and *Booker*, serious questions have emerged about whether *Harris*'s doctrinal underpinnings have been so substantially eroded that it no longer remains good law. Many lower courts have pointedly noted this question, although they obviously remain bound to follow a Supreme Court decision until the Court itself says otherwise.[40] Legal

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[39] 536 U.S. 545 (2002).

[40] *See, e.g.*, *United States v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005) ("We agree that *Harris* is difficult to reconcile with the Supreme Court's recent Sixth Amendment jurisprudence, but *Harris* has not been overruled. . . . We cannot question *Harris*' authority as binding precedent."); *United States v. Barragan-Sanchez*, 2006 WL 222823 at *2-3 (11th Cir. Jan. 30, 2006) ("The Supreme Court in *Booker* made no mention of *Harris*, nor has it overruled it since. Accordingly, while it is possible that *Booker*'s remedial scheme could implicate mandatory minimum sentences in the future, until the Supreme Court holds that mandatory minimums violate the Fifth and Sixth Amendments of the Constitution, we are obliged to continue following *Harris* as precedent."); *United States v. Lopez-Urbina*, 2005 WL 1940118 at *21 (5th Cir. Aug. 15, 2005) (unpublished opinion) ("We cannot hold that [cases like *Harris* have] been overruled absent express authority from the Supreme Court."); *United States v. Mackie*, 2005 WL 3263787 at *24 (2d Cir. 2005) (unpublished opinion) ("Regardless of the merits of this argument [that *Booker* undermines *Harris*], we must reject it. This court must adhere to Supreme Court precedent unless and until the Supreme Court itself overrules it."); *United States v. Malouf*, 377 F. Supp.2d 315, 326 (D. Mass. 2005) (stating that "the breadth of the holdings in *Booker* and

commentators, however, have not been as limited as courts in presenting their views on what the Supreme Court will do in the future. Many respected legal commentators have concluded that *Harris* probably does not survive the Court's decisions in *Blakely* and *Booker.*[41] As one example, it is noteworthy that Professor Frank Bowman (a former federal prosecutor and the first to opine about a topless scheme) has expressed his view that *Harris* is questionable because it creates "a strange asymmetry" in which jury fact-finding is required at the top of a guideline system but not at the bottom.[42] He concludes *Harris* "is in danger."[43]

In response to this issue, it might be argued that *Harris* is still "the law of the land" and that the Congress is entitled to rely upon it in drafting legislation. With respect, we believe that this point overlooks the equally salient fact that *Blakely* and *Booker,* too, are the law of the land. The ultimate question that the Supreme Court will have to decide, when squarely presented with

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Blakely have in fact overruled *Harris*").

[41] *See, e.g.*, Douglas A. Berman, *Tweaking* Booker: *Making Advisory Guidelines Work in the Federal System*, __ HOUS. L. REV. __ (forthcoming 2006) ("[T]he basic constitutionality of a topless guidelines system would necessarily be uncertain because it must rely upon the Supreme Court's *Harris* ruling . . . . [T]he enactment of a topless guideline system might well prompt the Court to make good on its threats to more directly police legislative definitions of crimes and applicable punishment."); Susan R. Klein, *Shifting Powers in the Federal Court: Symposium Issue: The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U.L. REV. 693, 740 (2005) ("Those who scoff at the notion of the Court overruling a constitutional decision [in *Harris*] only a few years old should stop and consider that such a decision would give federal judges, once again, primacy and discretion in sentencing."); Andrew Levine, *The Confounding Boundaries of "Apprendi-land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 423 (2002) ("But if the Court is to remain true to the constitutional principles underlying *Apprendi*, it should eventually overrule . . . *Harris* . . . . "); Kevin R. Reitz, *Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1097 & n.54 (2005) ("*Harris* is a sizable hole in the constitutional Swiss cheese. . . .").

[42] Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After* Booker, 2005 U. CHI. LEGAL FORUM 149, 215.

[43] *Id.*

the question, is whether these two more recent precedents have so eroded the underpinnings of *Harris* that it is no longer good law (as many academic commentators believe).

The possibility that the Supreme Court will take a dim constitutional view of a topless guidelines scheme is enhanced by the very nature of the proposal. The scheme looks like a gimmick. It makes an end run around the Supreme Court's constitutional pronouncements that juries have an important role to play in criminal sentencings. It does this by restructuring the Guidelines so that they purportedly "recommend" the same high-end sentence of something like twenty years in prison for every federal crime from the most minor offenses to the most serious felonies. The absurdity of this open-ended recommendation is underscored by the fact that, if such a scheme were in place, the Justice Department would apparently direct its own prosecutors not to seek sentences at the high end of these very broad ranges. Unfortunately, however, the lack of meaningful tops on the Guidelines may exacerbate the problem of sentence disparity (and perhaps discourage some defendants from pleading guilty).

In the *Apprendi* decision that spawned *Booker*, the Supreme Court specifically warned legislatures against evading the constitutional protections of the Sixth Amendment by expansively extending the maximum range of all criminal sentences.[44] The topless guidelines scheme might well be the kind of legislative evasion that the Supreme Court had in mind.

In light of this uncertainty, rebuilding the entire federal criminal justice system around *Harris* is risky. Were the Supreme Court to determine that *Harris* did not survive *Blakely* and *Booker*, the topless guidelines plan would be rendered unconstitutional – creating another shock

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[44] *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000).

to a system that is still absorbing *Booker*'s effects. That shock would likely be far greater than that from *Booker*. The *Booker* remedial opinion was able to creatively preserve the federal sentencing system in a way that avoided the need to resentence most criminal defendants. But a topless guidelines scheme would likely either be constitutional or unconstitutional *in toto*. If unconstitutional, then every defendant sentenced under the scheme might have the opportunity to personally appear before the trial court for a resentencing.[45] Tens of thousands of criminal cases might be implicated in such a ruling. It is also not immediately clear how legislation could be written with any effective "fallback" or "severance" clauses to avert such a possibility. Retroactivity questions surrounding any rulings on these issues would be quite complex, with respect both to cases pending on direct appeal and on habeas. Moreover, during the time leading up to any Supreme Court ruling (a year or two, at least) extraordinary legal confusion and uncertainty could arise in the lower courts following the enactment of a constitutionally questionable structural change to the federal sentencing guidelines. These would truly be devastating consequences for a system that is just now becoming fully adjusted to *Booker*.

The case for waiting before making any dramatic changes in this area is reinforced by the Supreme Court's recent decision to grant certiorari in *Cunningham v. California*.[46] That case presents the issue of whether California's determinate sentencing scheme violates *Blakely* (the state predecessor to *Booker*). The defendant in *Cunningham* was convicted of one count of continuous sexual abuse of a minor. The statutory penalty for the crime was a sentence of either six, twelve, or sixteen years. Under California's penal code, when a statute specifies three

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[45] *See* FED. R. CRIM. P. 43(a)(3) (defendant's presence required at sentencing).
[46] 2006 WL 386377, No. 05-655 (U.S. Feb. 21, 2006).

possible sentence terms, the court must impose the middle of three possible sentences "unless there are circumstances in aggravation or mitigation of the crime." But California law requires the sentencing judge — not a jury — to determine whether aggravating or mitigating circumstances exist. On appeal, the California courts held that this determinate sentencing scheme does not violate *Blakely* or *Booker* because Cunningham's sixteen-year sentence was within the authorized range of punishment. *Cunningham* thus should clarify whether determinate sentencing schemes that specify more than one possible sentence violate the Constitution and thus provide further guidance for federal legislation in this area.

For all these reasons, for the Congress to move forward with topless guidelines, at least at this time, would be a giant gamble.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 11. Pleas

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable

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*New material is underlined; matter to be omitted is lined through.

sentencing guideline range ~~apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances~~ and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

* * * * *

COMMITTEE NOTE

Subdivision (b)(1)(M). The amendment conforms Rule 11 to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

Rule 32. Sentence and Judgment

* * * * *

(d) Presentence Report.

(1) ***Applying the Sentencing Guidelines.*** The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) ***Additional Information.*** The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

* * * * *

(h) Notice of ~~Possible Departure From Sentencing Guidelines~~Intent to Consider Other Sentencing Factors. Before the court may ~~depart from the applicable sentencing range~~ rely on a ground not identified ~~for departure~~ either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline

sentence ~~such a departure~~. The notice must specify any ground not earlier identified on which the court is contemplating a departure or a non-guideline sentence.

* * * * *

(k) Judgment.

(1) ***In General.*** The court must use the judgment form prescribed by the Judicial Conference of the United States. In ~~the~~ a judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence, including the statement of reasons required by 18 U.S.C. § 3553(c). If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

* * * * *

COMMITTEE NOTE

Subdivision (d). The amendment conforms Rule 32(d) to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. Amended subsection (d)(2)(F) makes clear that the court can instruct the probation office to gather and include in the presentence report any information relevant to the factors articulated in § 3553(a). The rule contemplates that a request can be made either by the court as a whole requiring information affecting all cases or a class of cases, or by an individual judge in a particular case.

Subdivision (h). The amendment conforms Rule 32(h) to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well,

see § 3553(a) (Supp.2004)." *Id.* at 757. The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Accordingly, the required notice that the court is considering factors not identified in the presentence report or in the submission of the parties that could yield a sentence outside the guideline range should identify factors that might lead to either a guideline departure or a sentence based on factors under 18 U.S.C. § 3553(a).

The amendment refers to a "non-guideline" sentence to designate a sentence not based exclusively on the guidelines. In the immediate aftermath of *Booker*, the lower courts have used different labels to refer to sentences based on considerations that would not have warranted departures under the mandatory guideline regime, but are now permissible because the guidelines are advisory. *Compare United States v. Crosby*, 397 F.3d 103, 111 n. 9 (2d Cir. 2005) (referring to "non-Guidelines" sentence), *with United States v. Wilson*, 350 F. Supp.2d 910, 911 (D. Utah 2005) (suggesting the term "variance"). This amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court.

Subdivision (k). The amendment is intended to standardize the collection of data on federal sentences by requiring all courts to enter their judgments, including the statement of reasons, on the forms prescribed by the Judicial Conference of the United States. The collection of standardized data will assist the United States Sentencing Commission and Congress in their evaluation of sentencing patterns following the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act

"makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. The *Booker* opinion cast no doubt on the continuing validity of 18 U.S.C. § 3553(c), which requires the sentencing court to provide "the court's statement of reasons, together with the order of judgment and commitment" to the Sentencing Commission.

Rule 35. Correcting or Reducing a Sentence

* * * * *

(b) Reducing a Sentence for Substantial Assistance.

(1) ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if: the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person. ~~(A) the defendant, after sentencing, provided substantial assistance in~~

~~investigating or prosecuting another person; and~~

~~(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.~~

* * * * *

COMMITTEE NOTE

Subdivision (b)(1). The amendment conforms Rule 35(b)(1) to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. Subsection (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

Rule 45. Computing and Extending Time

* * * * *

28 U.S.C. § 994. Duties of the Commission

* * * * *

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission in a format approved and required by the Commission a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

* * * * *

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the ~~may assemble or maintain in electronic form that include any~~ information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

* * * * *

H. R. 3199

One Hundred Ninth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the third day of January, two thousand and six

An Act

To extend and modify authorities needed to combat terrorism, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "USA PATRIOT Improvement and Reauthorization Act of 2005".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

"CONSECUTIVE SENTENCE FOR MANUFACTURING OR DISTRIBUTING, OR POSSESSING WITH INTENT TO MANUFACTURE OR DISTRIBUTE, METHAMPHETAMINE ON PREMISES WHERE CHILDREN ARE PRESENT OR RESIDE

"SEC. 419a. Whoever violates section 401(a)(1) by manufacturing or distributing, or possessing with intent to manufacture or distribute, methamphetamine or its salts, isomers or salts of isomers on premises in which an individual who is under the age of 18 years is present or resides, shall, in addition to any other sentence imposed, be imprisoned for a period of any term of years but not more than 20 years, subject to a fine, or both.".

(b) CLERICAL AMENDMENT.—The table of contents of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is amended by inserting after the item relating to section 419 the following new item:

"Sec. 419a. Consecutive sentence for manufacturing or distributing, or possessing with intent to manufacture or distribute, methamphetamine on premises where children are present or reside.".

SEC. 735. AMENDMENTS TO CERTAIN SENTENCING COURT REPORTING REQUIREMENTS.

Section 994(w) of title 28, United States Code, is amended—

(1) in paragraph (1)—

(A) by inserting ", in a format approved and required by the Commission," after "submits to the Commission";

(B) in subparagraph (B)—

(i) by inserting "written" before "statement of reasons"; and

(ii) by inserting "and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission" after "applicable guideline range"; and

(C) by adding at the end the following:

"The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission."; and

(2) in paragraph (4), by striking "may assemble or maintain in electronic form that include any" and inserting "itself may assemble or maintain in electronic form as a result of the".

SEC. 736. SEMIANNUAL REPORTS TO CONGRESS.

(a) IN GENERAL.—The Attorney General shall, on a semiannual basis, submit to the congressional committees and organizations specified in subsection (b) reports that—

(1) describe the allocation of the resources of the Drug Enforcement Administration and the Federal Bureau of Investigation for the investigation and prosecution of alleged violations of the Controlled Substances Act involving methamphetamine; and

(2) the measures being taken to give priority in the allocation of such resources to such violations involving—

(A) persons alleged to have imported into the United States substantial quantities of methamphetamine or scheduled listed chemicals (as defined pursuant to the amendment made by section 711(a)(1));

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 06a0135p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WAYNE MORGAN JONES,
Defendant-Appellant.

No. 05-5657

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 05-00001—Karl S. Forester, District Judge.

Submitted: January 25, 2006

Decided and Filed: April 17, 2006

Before: MOORE and McKEAGUE, Circuit Judges; POLSTER, District Judge.*

COUNSEL

ON BRIEF: Adele Burt Brown, Lexington, Kentucky, for Appellant. Charles P. Wisdom, Jr., ASSISTANT UNITED STATES ATTORNEY, Lexington, Kentucky, for Appellee.

POLSTER, D. J., delivered the opinion of the court, in which McKEAGUE, J., joined. MOORE, J. (pp. 7-9), delivered a separate dissenting opinion.

OPINION

POLSTER, District Judge. Defendant-Appellant Wayne Morgan Jones ("Jones") was sentenced to twelve months of imprisonment for defrauding and attempting to defraud a financial institution in violation of 18 U.S.C. § 1344(1) and using another person's identity to commit this fraud in violation of 18 U.S.C. §§ 1028(a)(7) and (2). Jones appeals this sentence, arguing that the district court should have reduced his sentence pursuant to U.S. Sentencing Guidelines ("U.S.S.G") § 5K2.23 because he had already served a one-year state sentence for the same conduct. For the reasons stated below, we **AFFIRM** Jones' sentence.

*The Honorable Dan Aaron Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

I.

On November 12, 2002, Jones fraudulently assumed the identity, including the date of birth and social security number, of Orville Wayne Hudson, to secure a $21,995 loan from Bank of America to purchase a recreational vehicle. On June 2, 2003, Jones traded in the vehicle at a dealership, using the proceeds to purchase another motor vehicle. To finance the purchase of the second motor vehicle, Jones again assumed the identity of Orville Wayne Hudson to secure a second loan from Bank of America.[1]

On December 10, 2003, Jones was sentenced for receiving stolen property in a Kentucky state court based on his illegally obtaining and possessing the second motor vehicle. Jones served 365 days in prison for this offense and was released from state custody on August 27, 2004.

On December 14, 2004, Jones was arrested on federal charges of bank fraud and identity theft based on his use of Orville Wayne Hudson's identity to finance the purchase of the two motor vehicles. Jones pled guilty to the charges without a written plea agreement. The presentence investigation report indicated that a § 5K2.23 downward departure[2] might be appropriate given that Jones had already served a state sentence for relevant conduct. At the sentencing hearing, Jones did not specifically request a downward departure pursuant to § 5K2.23. He did, however, request probation rather than a custodial sentence because, among other reasons, he had already served twelve months in state prison for the same conduct. The district court denied this request and sentenced Jones to twelve months of imprisonment, the high end of the 6-12 month advisory Guidelines range for offense level 10, Criminal History Category I.

II.

Jones argues that the trial court erred in failing to give him a below-Guidelines sentence under U.S.S.G. § 5K2.23 because of the one year he had already served in state prison for the same conduct. At the sentencing hearing, Jones' attorney did not specifically reference § 5K2.23 in his remarks to the district court, or specifically request a downward departure, but he did request a sentence of probation. Jones argues that his request for probation "would have required a downward departure because [Jones] was not eligible for probation according [to] the [G]uideline calculation."[3] Appellant's Br. at 4.

Section 5K2.23 provides as follows:

> A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of § 5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment) would

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[1] It appears that Jones used the fictitious name Wayne T. Hudson, but adopted the non-fictitious social security number and date of birth of Orville Wayne Hudson, to secure these loans. *See* J.A. at 39-40 (Presentence Report at 6-7); Appellant's Br. at 3.

[2] As the Guidelines are now only advisory, *see United States v. Booker*, 543 U.S. 220, 245 (2005), the term "below-Guidelines sentence" is a more accurate term than "departure."

[3] The parties agree that Jones was at offense level 10 and Criminal History Category I, which produced an advisory Guidelines range of 6-12 months. U.S.S.G. § 5B1.1(b)(1) prohibits the imposition of a sentence of probation where the offense of conviction is a Class A or B felony. Bank fraud is a Class B felony. *See United States v. Burns*, 433 F.3d 442, 445 n.1 (5th Cir. 2005); *United States v. Wilbon*, 150 F. App'x 497, 499 (6th Cir. 2005) (unpublished). Furthermore, § 5B1.1(b)(3) bars a sentence of probation where the defendant is simultaneously sentenced to a term of imprisonment for the same or a different offense. *See also* 18 U.S.C. § 3561(a); *United States v. Thornton*, No. 92-2132, 1992 WL 226938, at *1 (8th Cir. Sept. 17,1992) (unpublished).

> have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

U.S.S.G. § 5G1.3(b) authorizes an adjustment in a defendant's sentence and the concurrent running of sentences where the defendant is currently serving a sentence that "resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments)."[4]

Prior to the U.S. Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), it was well-established in this Circuit that a district court's decision to deny a request for a downward departure was not reviewable unless the district court judge "incorrectly believed that [he] lacked any authority to consider defendant's mitigating circumstances as well as the discretion to deviate from the guidelines." *United States v. Clark*, 385 F.3d 609, 623 (6th Cir. 2004) (quoting *United States v. Landers*, 39 F.3d 643, 649 (6th Cir. 1994)); *United States v. Stewart*, 306 F.3d 295, 329 (6th Cir. 2002). In *United States v. Puckett*, 422 F.3d 340, 344-45 (6th Cir. 2005), this Court held that the pre-*Booker* standard foreclosing review of a district court's decision not to depart downward "unless the record reflects that the district court was not aware of or did not understand its discretion to make such a departure" survived *Booker*. *Id.* at 344 (citing *Stewart*, 306 F.3d at 329). The Court concluded that it did not have authority to review the district court's decision not to depart downward and affirmed the defendant's sentence. *Id.* at 346.

In *United States v. McBride*, 434 F.3d 470 (6th Cir. 2006), this Court addressed the potential tension between *Booker* and *Puckett* and clarified the scope of our review of sentences post-*Booker* in light of *Booker's* mandate to review a district court's sentence for reasonableness. The Court limited the holding in *Puckett* to preclude the review of that narrow determination to deny a Guidelines-based departure within the context of the advisory Guidelines calculation. Since under *Booker* this would merely be one factor to be considered when imposing a sentence, *McBride*, 434 F.3d at 474 n.1, 476, the Court held that *Puckett* did not alter our ability to review the overall reasonableness of a district court's sentence, and attributed the absence of this review in *Puckett* to the majority's belief that the defendant did not properly argue for reasonableness review on appeal. *Id.* at 474-75, 476 n.4; *see id.* at 476-77 ("[*Puckett*] does not prevent our review of a defendant's claim that his sentence is excessive based on the district court's unreasonable analysis of the [18 U.S.C. §] 3553(a) factors in their totality.").

III.

We now review Jones' sentence for reasonableness. The district court must articulate the reasons for the particular sentence imposed in order to enable this Court to engage in a meaningful reasonableness review of the sentence. *United States v. Jackson*, 408 F.3d 301, 305 (6th Cir. 2005) (finding reasonableness review impossible where the district court provided a list of characteristics of the defendant that it considered at sentencing, without any accompanying analysis, and did not reference the applicable Guidelines provisions); *see also United States v. James Williams*, 432 F.3d 621, 623-24 (6th Cir. 2005) (affirming the district court's decision to depart downward where the district court, in following the framework established in *Jackson*, considered the applicable Guidelines range and provided a detailed analysis in support of its decision to depart). This Court has determined that a reasonableness review contains both substantive and procedural components.

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[4]The parties apparently agree that § 5G1.3(b) would have provided an adjustment had Jones' completed term of imprisonment been undischarged at the time of Jones' sentencing for the instant offense.

McBride, 434 F.3d at 475 n.3 (citing *United States v. Webb*, 403 F.3d 373, 383-85 (6th Cir. 2005)). We must consider, therefore, the length of the sentence as well as "the factors evaluated and the procedures employed by the district court in reaching its sentencing determination." *Webb*, 403 F.3d at 383.

In determining the sentence to be imposed, the district court must consider the advisory Guidelines range and all relevant factors identified in 18 U.S.C. § 3553(a). *Jackson*, 408 F.3d at 305; *McBride*, 434 F.3d at 476. This Court recently held that sentences properly calculated under the advisory Guidelines are accorded a rebuttable presumption of reasonableness. *United States v. Leonard Williams*, 436 F.3d 706, 708 (6th Cir. 2006). Here, the district court properly calculated and considered the appropriate Guidelines range. We must, however, review under the reasonableness standard the district court's consideration and analysis of the factors listed in § 3553(a). *McBride*, 434 F.3d at 476-77.

Jones argues that his sentence is unreasonable because the district court failed to consider the policy statement set forth in U.S.S.G. § 5K2.23 which authorizes courts to depart downward if the defendant has already served a term of imprisonment for relevant conduct. This Guidelines provision is a pertinent factor under § 3553(a)(5) which requires the district court to consider any relevant policy statements in determining the sentence to be imposed.[5] Although the district judge did not explicitly refer to § 5K2.23 in his sentencing determination, he stated on the record that he considered the sentencing objectives set forth in § 3553 and determined that the sentence imposed would meet those objectives. J.A. at 27 (Tr. of Sentencing Hr'g at 7).

The district court need not explicitly reference each of the § 3553(a) factors in its sentencing determination. *McBride*, 434 F.3d at 475 n.3; *Leonard Williams*, 436 F.3d at 708. However, there must be "sufficient evidence in the record to affirmatively demonstrate the court's consideration of [these factors]." *McBride*, 434 F.3d at 475 n.3. Here, the district court properly considered the factors set forth in § 3553(a) in crafting the appropriate sentence.

The court found that "the scope of . . . Jones' fraudulent activities spans over 20 years and far exceeds that which is normally encountered by the Court." J.A. at 26 (Tr. of Sentencing Hr'g at 6). A review of the presentence report reveals that these fraudulent activities included convictions for interstate transportation of stolen vehicles, issuing insufficient funds checks, and alteration of automobile odometers. J.A. at 43-45 (Presentence Report ("PSR") at 10-12).[6] These prior convictions were too old to count in computing Jones' criminal history category, *see* U.S.S.G. § 4A1.1(a) cmt. n. 1 (citing *id.* § 4A1.2(e)), and Jones was therefore in Criminal History Category I. The district judge stated that he believed that the advisory Guidelines range was too low. J.A. at 27 (Tr. of Sentencing Hr'g at 7). The district judge then stated that he gave serious consideration to an upward departure, but, because of Jones' medical condition, decided not to depart upward. J.A. at 27 (Tr. of Sentencing Hr'g at 7). The court indicated that it had sympathy for Jones due to his heart condition but other than that had "absolutely no sympathy" for him. J.A. at 26 (Tr. of Sentencing Hr'g at 6). The court, therefore, considered "the nature and circumstances of the offense" and Jones' "history and characteristics," *see* 18 U.S.C. § 3553(a)(1), as well as "the need for the sentence imposed . . . to reflect the seriousness of the offense . . . and to provide just

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[5]This provision would also be pertinent under § 3553(a)(2)(A) (requiring the court to consider the need for the sentence imposed to provide just punishment for the offense) and (2)(B) (requiring the court to consider the need for the sentence imposed to afford adequate deterrence to criminal conduct).

[6]The only prior conviction listed in the presentence report that was not too old for purposes of computing Jones' criminal history category was the 12-month sentence Jones served in state prison. *See* J.A. at 45 (PSR at 12). However, this offense was not assigned any criminal history points because the underlying conduct was considered conduct that is part of the instant offense. *See* J.A. at 46 (PSR at 13) (citing U.S.S.G. § 4A1.2(a)(1)).

punishment for the offense," *id.* § 3553(a)(2)(A); *see* J.A. at 27 (Tr. of Sentencing Hr'g at 7) (stating that Jones "deserves to be punished").

Given Jones' criminal history, "it was reasonable for the district court to place substantial weight on [this factor] in reaching its sentencing determination." *Webb,* 403 F.3d at 384 (finding that the district judge was understandably troubled by the defendant's lengthy criminal history). In fact, after his first federal conviction in 1967, Jones absconded from probation, changed his name to Wayne Thomas Hudson, and adopted a false date of birth and social security number. J.A. at 40, 43 (PSR at 7, 10). In addition to adopting the name Wayne Thomas Hudson and the accompanying identifiers, all of which were fictitious, Jones used the non-fictitious date of birth and social security number of Orville Wayne Hudson to commit the instant offense. J.A. at 39-40 (PSR at 6-7); *see also* Appellant's Br. at 3 (stating that Orville Wayne Hudson and Wayne T. Hudson are different people).

The district court also considered Jones' physical condition, 18 U.S.C. § 3553(a)(5); U.S.S.G. § 5H1.4, in arriving at the appropriate sentence.[7] Furthermore, the district court considered "the need to provide restitution to any victims of the offense," 18 U.S.C. § 3553(a)(7), and determined that restitution could be made before, during and after incarceration. J.A. at 29 (Tr. of Sentencing Hr'g at 9). In discussing Jones' inability to pay a fine, the court took into account "the kinds of sentences available," *see* 18 U.S.C. § 3553(a)(3); J.A. at 29-30 (Tr. of Sentencing Hr'g at 9-10); *Leonard Williams,* 436 F.3d at 708 (finding that the district court, in discussing the defendant's inability to pay a fine, addressed "the kinds of sentences available"), and, in requiring Jones to undergo mental health treatment while on supervised release, the district court considered "the need for the sentence imposed . . . to provide the defendant with . . . correctional treatment in the most effective manner," 18 U.S.C. § 3553(a)(2)(D).

The dissent contends that because the district court did not explain its rejection of Jones' argument for a reduced sentence, Jones' sentence cannot be meaningfully reviewed. We disagree. The district court complied with this Court's holding in *United States v. Richardson,* 437 F.3d 550, 554 (6th Cir. 2006), that a sentencing judge must explain to the parties and the reviewing court its reasons for imposing a particular sentence.

The sentencing regime that the U.S. Supreme Court created in *United States v. Booker,* 543 U.S. 220 (2005), places the responsibility for sentencing in the hands of the district judge, who must consult the Guidelines and adhere to the factors set forth in 18 U.S.C. § 3553(a). While this Court reviews a sentence for both procedural and substantive reasonableness, *McBride,* 434 F.3d at 476 n.3; *Webb,* 403 F.3d at 383, a sentence within the applicable Guidelines range should not lose its presumption of reasonableness whenever a district judge does not explicitly address every defense argument for a below-Guidelines sentence. Otherwise, the procedural reasonableness review will become appellate micromanaging of the sentencing process.

The district court considered the applicable Guidelines range, the factors identified in § 3553(a), and articulated its reasons for the sentence imposed. Given that the applicability of U.S.S.G. § 5K2.23 was articulated in the presentence report and defense counsel twice informed the district court that Jones had already served a twelve-month sentence in state court for the same conduct, we find that the district court was aware of Jones' previous state sentence but nevertheless

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[7]The Guidelines discourage courts from considering a defendant's physical condition in determining whether a departure may be warranted. *See* U.S.S.G. § 5H1.4. We need not decide whether the district court improperly considered Jones' health pursuant to § 5H1.4 because that provision applies to downward departures. Here, the district court did not rely on Jones' medical condition as a basis to depart downward; rather, this factor was considered by the district court as a basis not to depart upward. *See also Jackson,* 408 F.3d at 305 n.3 (addressing the district court's decision to grant a downward departure); *United States v. Briceno,* 136 F. App'x 856, 857-59 (6th Cir. 2005) (unpublished) (same).

sentenced him to twelve months of imprisonment in light of the gravity of the offense and his extensive criminal history. Accordingly, we find that Jones' sentence is not unreasonable "with regard to the length, the factors considered, or the procedures employed by the district court [in reaching its sentencing determination]," *Webb,* 403 F.3d at 385, and we affirm the sentence of the district court.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. I agree with the majority's conclusion that we must review Jones's overall sentence for reasonableness. However, because the district court's failure to explain why it rejected Jones's argument seeking a lower sentence under a relevant 18 U.S.C. § 3553(a) factor flies in the face of this court's precedents and makes the sentence impossible properly to review, I cannot find Jones's sentence reasonable. Accordingly, I respectfully dissent.

After *United States v. Booker*, 543 U.S. 220 (2005), this court reviews a sentence for both procedural and substantive reasonableness. *United States v. McBride*, 434 F.3d 470, 476 n.3 (6th Cir. 2006); *United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005). Although procedural reasonableness does not require the district court to cite each § 3553(a) factor in arriving at a sentence, *McBride*, 434 F.3d at 476 n.3, it does require, as this court has held and the majority recognizes, that the district court "consider the advisory Guidelines range and *all relevant factors identified in 18 U.S.C. § 3553(a)*." Majority Opinion ("Maj. Op.") at 4 (emphasis added); *accord United States v. Foreman*, 436 F.3d 638, 644 (6th Cir. 2006); *United States v. Richardson*, 437 F.3d 550, 553-54 (6th Cir. 2006); *United States v. Jackson*, 408 F.3d 301, 305 (6th Cir. 2005); *Webb*, 403 F.3d at 383. The presumption of reasonableness afforded to sentences within the advisory Guidelines range, *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006), does not relieve the district court of its duty "to explain to the parties and the reviewing court its reasons for imposing a particular sentence." *Richardson*, 437 F.3d at 554. The presumption is rebutted where the district court fails to articulate its rationale in a way that permits meaningful appellate review. This court has held that meaningful reasonableness review requires that "[w]here a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it." *Id.* at 554; *accord Foreman*, 436 F.3d at 644 (explaining that a sentence within the Guidelines range carries no presumption of reasonableness where the record does not reflect that the court considered "all of the relevant section 3553(a) factors"); *Jackson*, 408 F.3d at 305 (stating that procedural reasonableness requires "reference to the applicable Guidelines provisions").

In this case, Jones clearly argued that he was entitled to a reduction in his sentence because he had already served a one-year sentence for the same conduct at issue in the instant case. The presentence investigation report ("PSR") also discusses the applicability of the policy statement found at U.S. SENTENCING GUIDELINES MANUAL ("USSG") § 5K2.23, which advises courts that they can, when certain circumstances are met, depart downwards for sentences already served based on the same conduct.[1] The district court must consider relevant policy statements in its sentencing

[1]It is not clear that Jones was eligible for a reduction in his sentence under USSG § 5K2.23. The PSR indicates that Jones's state conviction and sentence would have been considered sufficiently similar conduct under USSG § 5K2.23. The PSR specifically noted that Jones did not receive any criminal history points for his receiving stolen property conviction because it "is considered conduct which is part of the instant offense." Joint Appendix at 46 (PSR at 13). The government did not object to this statement in the PSR. Regardless of whether the policy statement applied, both Jones and the PSR reasonably raised the issue of his time already served as applicable to his sentence, and thus the district court was obligated to consider it and explain the court's assessment as to why it did or did not apply. *See Richardson*, 437 F.3d at 554. *Richardson* makes clear that the duty of the district court to explain its determination of a defendant's argument for a reduced sentence applies equally where the district court ultimately rejects the defendant's argument. *Id.* Moreover, even if USSG § 5K2.23 was not applicable, Jones's already-served prison time for the same conduct should have been considered, as the majority acknowledges, as part of the assessment of other § 3553(a) factors, including the need for the sentence to impose a "just punishment," 18 U.S.C. § 3553(a)(2)(A), and the need for the sentence to provide "adequate deterrence to criminal conduct," *id.* § 3553(a)(2)(B). *See* Maj. Op. at 4 n.5.

determinations under 18 U.S.C. § 3553(a)(5). *United States v. Williams*, 432 F.3d 621, 623-24 (6th Cir. 2005); *United States v. Kirby*, 418 F.3d 621, 626 (6th Cir. 2005). Under the mandates of procedural reasonableness, the district court was obligated to demonstrate that it considered, as directed by 18 U.S.C. § 3553(a)(5) and USSG § 5K2.23, the fact that Jones had already served a one-year sentence for the same conduct at issue here.[2] That the district court has failed to do. Despite the facts that Jones raised the issue of his time already served for the same conduct and that the PSR discussed the potential applicability of USSG § 5K2.23, the district court made no mention of them and provided no indication that it had considered either the policy statement or the time already served.

The majority incorrectly asserts that the district court complied with the standards for procedural reasonableness set forth in *Richardson*, 437 F.3d at 554, because the district court "explain[ed] to the parties and the reviewing court its reasons for imposing a particular sentence." Maj. Op. at 5. *Richardson* certainly requires this, but it also requires more, namely that "[w]here a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it." 437 F.3d at 554. Although the majority may believe that "a sentence within the applicable Guidelines range should not lose its presumption of reasonableness whenever a district judge does not explicitly address every defense argument for a below-Guidelines sentence," Maj. Op. at 5, this panel is not at liberty to contradict the law of this circuit as previously decided by a unanimous panel of this court in *Richardson*. *See* 6TH CIR. R. 206(c) (directing that "[r]eported panel opinions are binding on subsequent panels").

Perhaps recognizing that it cannot merely ignore *Richardson*'s conclusion that a sentence is unreasonable if the district court fails to consider a defendant's argument seeking a lower sentence or explain its basis for rejecting such an argument, the majority somehow "find[s]" that the district court "was aware of Jones' previous state sentence but nevertheless sentenced him to twelve months of imprisonment in light of the gravity of the offense and his extensive criminal history," based on the fact that "the applicability of U.S.S.G. § 5K2.23 was articulated in the presentence report and defense counsel twice informed the district court. . . ." Maj. Op. at 5-6. However, the majority's speculation regarding the district judge's consideration of this factor also directly contradicts *Richardson*, which requires that for a sentence to be procedurally reasonable, "the *record must reflect both* that the district judge *considered* the defendant's argument and that the judge *explained the basis for rejecting it*." 437 F.3d at 554 (emphases added). A sentencing court has not met this obligation where this court must guess as to what the court below did or did not consider. Rather, there must be "sufficient evidence in the record *to affirmatively demonstrate* the court's consideration" of the relevant § 3553(a) factors. *McBride*, 434 F.3d at 476 n.3; *accord Foreman*, 436 F.3d at 644 (explaining that the sentencing court's consideration of "all of the relevant section 3553(a) factors" must be "clear from the record"). Where the district judge fails "to explicitly

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I now turn to a brief note on terminology. Our court has previously explained that departures based on Chapter 5 of the Guidelines should be referred to as "Guideline departures," and that "sentences lower than the Guidelines recommendation based on *section 3553(a)* factors" can be referred to as "Non-Guideline departures." *McBride*, 434 F.3d at 477 n.5. Several of our sister circuits reserve the term "departure" for traditional Chapter 5 departures, and refer to "Non-Guideline departures" as "variances." *See, e.g.*, *United States v. Hampton*, --- F.3d ---, No. 05-4224, 2006 WL 724811, at *2 (4th Cir. Mar. 23, 2006); *United States v. Gatewood*, 438 F.3d 894, 896-97 (8th Cir. 2006). The term "variance" is useful in clearly distinguishing traditional departures from sentences that fall below the Guidelines based on the district court's discretion in applying the § 3553(a) factors.

[2]The majority notes that Jones specifically sought probation and that probation was not available to him because of the type of crime of which he was convicted and the fact that he had been sentenced to imprisonment for another offense. Maj. Op. at 2 n.3. Whether Jones was eligible for probation does not affect this court's review of the sentence because Jones remained eligible to receive a lesser sentence short of probation under the advisory Guidelines, and thus consideration of the USSG § 5K2.23 policy statement was relevant.

consider" these factors, there must be "other evidence in the record demonstrating that they were thoroughly considered by the district court." *McBride*, 434 F.3d at 476 n.3. Neither the Government nor the majority can point to any such evidence. Indeed, the majority's conjectural "find[ing]" makes plain that the record neither "affirmatively demonstrate[s]," *McBride*, 434 F.3d at 476 n.3, nor makes "clear," *Foreman*, 436 F.3d at 644, that the district court even considered Jones's state sentence, let alone explained its reasons for rejecting his argument on this ground. The majority's conclusion to the contrary is pure speculation in contravention of *Richardson*, *Foreman*, and *McBride*.

Due to the district court's failure to explain its consideration and rejection of Jones's argument in support of a reduced sentence, Jones's sentence cannot be meaningfully reviewed. I would therefore vacate Jones's sentence and remand for resentencing. I respectfully dissent.

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARCO EUGENE FOREMAN, Defendant-Appellant.

No. 04-2450

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

06a0049p.06;
436 F.3d 638; 2006 U.S. App. LEXIS 2989; 2006 FED App. 0049P (6th Cir.)

December 9, 2005, Argued
February 8, 2006, Decided
February 8, 2006, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Michigan at Grand Rapids. No. 03-00276. Gordon J. Quist, District Judge.

COUNSEL: ARGUED: Paul L. Nelson, FEDERAL PUBLIC DEFENDER'S OFFICE, Grand Rapids, Michigan, for Appellant.

Joan E. Meyer, ASSISTANT UNITED STATES ATTORNEY, Grand Rapids, Michigan, for Appellee.

ON BRIEF: Paul L. Nelson, FEDERAL PUBLIC DEFENDER'S OFFICE, Grand Rapids, Michigan, for Appellant.

Joan E. Meyer, Andrew Byerly Birge, ASSISTANT UNITED STATES ATTORNEY, Grand Rapids, Michigan, for Appellee.

JUDGES: Before: MERRITT, MARTIN, and COLE, Circuit Judges.

OPINIONBY: BOYCE F. MARTIN, JR.

OPINION: [*639] [***1] BOYCE F. MARTIN, JR., Circuit Judge. Marco Foreman appeals his sentence for the crime of possession of a firearm by a felon. Foreman raises a *Booker* challenge to his sentence and the United States does not contest this appeal. Foreman also challenges the district court's ruling that a prior conviction for fleeing and eluding in the fourth degree is a crime of violence under the Federal Sentencing Guidelines. For the reasons below, we VACATE Foreman's sentence and REMAND the case for resentencing.

I.

On July 20, 2004, Marco Foreman pled guilty [**2] to possessing a firearm after having [*640] previously been convicted of a felony offense in violation of 18 U.S.C. § 922(g)(1). At the hearing, Foreman admitted to possession of a firearm and to his previous felony conviction. The district court determined that, under the Guidelines, Foreman's Total Offense level was 21 and Criminal History [***2] Category was VI, producing a Guideline range of 77-96 months imprisonment. A factor in the determination of Foreman's Total Offense level was his prior conviction for fleeing and eluding in the fourth degree. The district court concluded this was a "crime of violence" under the Guidelines which raised his Total Offense level six points from a Base Offense Level of 14 to 20. The district court sentenced Foreman to 77 months in prison, but then added "if it were not for the guidelines, the sentence would be 60 months." Foreman filed a timely appeal on November 8, 2004.

II.

Foreman claims that his sentence should be vacated based on *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). The United States agrees that a remand is appropriate. *See United States v. Barnett*, 398 F.3d 516 (6th Cir. 2005). [**3] We therefore vacate and remand for resentencing.

Foreman also argues that the district court erred in qualifying his previous crime of fleeing and eluding in the fourth degree as a "crime of violence." Although *Booker* held that the Sentencing Guidelines are not mandatory, we must determine whether a specific element of the Sentencing Guidelines applies because a district court must still consider the Guidelines when imposing "a sentence sufficient, but not greater than necessary, to comply with the purposes" of section 3553(a). 18 U.S.C. § 3553(a); *See United States v. Webb*, 403 F.3d 373, 383-84 (6th Cir. 2005).

Legal conclusions regarding the application of the Guidelines are reviewed *de novo*. *United States v. Gregory*, 315 F.3d 637, 642 (6th Cir. 2003). The Guidelines set the Base Offense Level for Unlawful Possession of a Firearm at twenty "if the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense." U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 (a)(4)(A).

> The term "crime [**4] of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that -- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

§ 4B1.2(a). The commentary to section 4B1.2(a) notes that the definition of "crime of violence" includes any offense in which

> (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

§ 4B1.2 cmt. n. 1. In this case, the arguments revolve around how to interpret whether an offense "by its nature, presented a serious potential risk of physical injury to another."

The Supreme Court has provided some guidance [**5] as to how to determine whether an offense may be considered a crime of [*641] violence. In *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), the Court addressed what evidence a trial court may consider in answering the question. The Court concluded that we must take a categorical approach and first consider the statutory definition of the offense. *Id.* A categorical approach requires this Court to look at "the fact of the conviction and the statutory definition of the predicate offense" but not the "underlying facts regarding the offense." *United States v. Martin*, 378 F.3d 578, 581 (6th Cir. 2004) (quoting *United States v. Arnold*, 58 F.3d 1117, 1121 (6th Cir. 1995)). This approach "avoids subsequent evidentiary enquiries into the factual basis for the earlier conviction," preventing the defendant from having to re-defend previous conduct [***3] which may not have been found true by the previous jury. *Shepard v. United States*, 544 U.S. 13, 125 S. Ct.

1254, 1259, 161 L. Ed. 2d 205 (2005).

However, should this initial inquiry under the categorical approach fail to be determinative, a court may consider [**6] "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" in determining whether the crime was a crime of violence. *Id.* at 1257. Although both *Shepard* and *Taylor* addressed whether burglary could be considered a violent felony under the Armed Career Criminal Act, the application of these rules to the definition of "crime of violence" under the Sentencing Guidelines has become an accepted practice in this Circuit. *See United States v. Arnold*, 58 F.3d 1117, 1121-22 (6th Cir. 1995); *United States v. Burgin*, 388 F.3d 177, 186 (6th Cir. 2004).

III.

The crime in this case is the Michigan crime of fleeing and eluding in the fourth degree. Under the statute, the crime is

> (1) A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the [**7] vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the police or conservation officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the officer's vehicle is identified as an official police or department of natural resources vehicle.
>
> (2) Except as provided in subsection (3), (4), or (5), an individual who violates subsection (1) is guilty of fourth-degree fleeing and eluding, a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

M.C.L. § 750.479a.

This Court has had two occasions to determine whether offenses similar to the one in this case are in fact "crimes of violence." In *United States v. Harris*, 165 F.3d 1062 (6th Cir. 1999), this Court held that the Tennessee crime of escape is inherently a "crime of violence." We reasoned that "[a] defendant who escapes from a jail is likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees. Consequently, [**8] violence could erupt at any time." *Id.* at 1068 (quoting *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994)).

In *United States v. Martin*, this Court held that the Michigan crime of fleeing and eluding in the third degree is a "crime of [*642] violence." 378 F.3d at 584. The difference between third and fourth degree is that third degree fleeing and eluding requires proof of an additional element from one of the following:

> (a) The violation results in a collision or accident.
>
> (b) A portion of the violation occurred in an area where the speed limit is 35 miles an hour or less, whether that speed limit is posted or imposed as a matter of law.
>
> (c) The individual has a prior conviction for fourth-degree fleeing and eluding, attempted fourth-degree fleeing and eluding, or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct.

[***4] M.C.L. § 750.479a(3).

In *Martin*, this Court compared the general crime of fleeing and eluding to the crime of escape, concluding that both involve heightened emotions and adrenaline levels of [**9] the parties involved. 378 F.3d at 582-83. Relying heavily on how fleeing and eluding is similar to the crime of escape, the *Martin* court held that fleeing and eluding presented an even greater risk of injury than escape. *Id.* at 583. This greater risk is because fleeing inherently puts two parties at risk -- the person fleeing and the officer in pursuit -- while escape does not necessarily include a pursuing officer. *Id.* An individual committing fleeing and eluding makes "a deliberate choice to disobey a police officer" by which "the motorist provokes an inevitable, escalated confrontation with the officer" similar to the danger involved in an escape. *Id.* at 582.

The legal question posed before this Court is similar to the one addressed in *Martin*. We must now take the analysis one step further to determine whether *fourth degree* fleeing and eluding is a crime of violence rather than the *third degree* offense at issue in *Martin*. Although this Court discussed issues relevant to the fourth degree offense in *Martin*, the question was clearly left open by that panel for future discussion. 378 F.3d at 584 [**10] ("Even if it were true that the fourth-degree offense . . . does not pose a serious risk of injury, as Martin alleges, case law makes clear that we must look at the conduct charged in the indictment when the statutory offense potentially covers violent and non-violent crimes.").

This Court, in *Martin*, addressed each of the three additional elements which could lead to third degree fleeing and eluding. In our examination of both fleeing in a low speed area and causing an accident, we placed heavy emphasis on the word "potential" in the standard "serious potential risk of physical injury." *Id.* at 582-83. We found such a potential existed and, therefore, under the categorical approach, held that fleeing and eluding with either of these two elements could be considered a "crime of violence." *Id.* However, we failed to come to a similar result with the third potential element: a previous violation of fourth degree fleeing and eluding. *Id.* at 584. Instead, this Court held that because the categorical approach was unclear as to this element of third degree fleeing and eluding we had to turn to the facts of the incident, as allowed by *Shepard*. [**11] *Martin*, 378 F.3d at 584. In examining the charging document, we held that Martin had been charged with third degree fleeing and eluding based on "causing an accident, or fleeing in a 35-mile-per-hour zone, or both." *Id.* Therefore, his sentence was held to have been appropriately enhanced by the district court while leaving the question of whether fourth degree fleeing and eluding was a "crime of violence" unresolved. *Id.*

We are now faced, in this case, with resolving that question. Like in *Martin*, we conclude that fourth degree [*643] fleeing and eluding has a *potential* risk of physical injury to another. However, for a prior crime to be one "of violence" it must have "*serious* potential risk of physical injury." U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (emphasis added). In *Martin*, we emphasized the *potential* risk of harm to another; however we must also give weight to how the word "serious" modifies potential risk. Nearly any criminal offense has the *potential* risk of physical injury to another. *See United States v. Serna*, -___F.3d ___, 435 F.3d 1046, 2006 U.S. App. LEXIS 1578, 2006 WL 156731 (9th Cir. January 23, 2006) ("Serna's prior [**12] conviction was for possession of an object. Almost any object -- a car, a golf club, even a pair of nail clippers -- can be used to cause physical injury. . . Were an object's potential for causing physical injury enough to render illegal possession thereof a crime of violence, almost all possessory crimes would be crimes of violence"). According to the Guidelines, the potential risk must be *serious* in order for the offense to be a "crime of violence." Therefore, the potential risk can not be based on conjecture, but must be "weighty, important, dangerous, or potentially resulting in death or other severe consequences." BLACK'S LAW DICTIONARY (8th ed. 2004).

In *Martin*, we found that the general crime of fleeing and eluding had a potential risk of physical injury. 378 F.3d at 582-83. What made the potential risk serious, in that case, was the [***5] presence of the additional elements of fleeing in a low speed zone or causing an accident. *Id.* at 584. Given the absence of those elements in this case, we hold that the categorical approach is not determinative of whether fourth degree fleeing and eluding is a "crime of violence." Therefore, we [**13] must look to the *Shepard* sources in order to further examine whether fourth degree fleeing and eluding is a "crime of violence." 125 S. Ct. at 1259 ("the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant

assented"). Where the facts demonstrate a *serious* potential risk of physical injury to another, then the application of the "crime of violence" enhancement is appropriate. Where the facts indicate otherwise, it is not. Because the district court found the categorical approach determinative, we must vacate its decision and remand for resentencing.

Finally, in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), the Supreme Court invalidated the mandatory use of the Sentencing Guidelines and declared them "effectively advisory." We have stated that "once the appropriate advisory Guideline range is calculated, the district court throws this ingredient into the section 3553(a) mix." *United States v. McBride*, ___ F.3d ___, 434 F.3d 470, 2006 U.S. App. LEXIS 1010, 2006 WL 89159, *5 (6th Cir. January 17, 2006). Now that section 3553(a) is the focal point, and the Guidelines [**14] sentence is merely advisory, even if the district court determines that Foreman's prior offense was a "crime of violence," that is "not the end of the sentencing inquiry; rather, it is just the beginning." *Id.* 2006 U.S. App. LEXIS 1010, at [WL] *4. Section 3553(a) instructs district courts to impose "a sentence sufficient, but not greater than necessary, to comply with the purposes" set forth in that section.

Regardless of whether the district court determines that Foreman's prior offense was a crime of violence, the district court is not bound to adhere to the Guideline range. Even if the district court determines that Foreman's offense is a crime of violence, the court may conclude that the sentence ought to be lower than the Guideline range due to section 3553(a). Alternatively, should the court determine the crime is not one of violence, it may consider a higher sentence in light of the 3553(a) factors. We do not intimate an opinion either way. We include this only to make the point that the "crime of violence" inquiry [*644] is not the end of the sentencing determination. If the district court determines that section 3553(a) does not require it to impose the Guideline-recommended sentence based on an over or under [**15] inflated significance attributed to Foreman's prior convictions, this Court will later review that decision for reasonableness. n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 It is worth noting that a district court's job is not to impose a "reasonable" sentence. Rather, a district court's mandate is to impose "a sentence sufficient, but not greater than necessary, to comply with the purposes" of section 3553(a)(2). Reasonableness is the *appellate* standard of review in judging whether a district court has accomplished its task.

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - -

Finally, in *United States v. Williams*, we held that a Guidelines sentence is afforded a presumption of reasonableness.___F.3d ___, 436 F.3d 706, 2006 U.S. App. LEXIS 2304, No. 05-5416 (6th Cir. January 31, 2006). Although this statement seems to imply some sort of elevated stature to the Guidelines, it is in fact rather unimportant. *Williams* does not mean that a sentence outside of the Guidelines range -- either higher or lower -- is presumptively *unreasonable*. It is not. *Williams* does not mean that a Guidelines sentence will be found reasonable in [**16] the absence of evidence in the record that the district court considered all of the relevant section 3553(a) factors. A sentence within the Guidelines carries with it no implication that the district court considered the 3553(a) factors if it is not clear from the record, because, of course, under the Guidelines as mandatory, a district court was not required to consider the section 3553(a) factors. It would be unrealistic to now claim that a Guideline sentence implies consideration of those factors.

Moreover, *Williams* does not mean that a sentence within the Guidelines is reasonable if there is no evidence that the district court followed its statutory mandate to "impose a sentence sufficient, but not greater than necessary" to comply with the purposes of sentencing in section 3553(a)(2). Nor is it an excuse for an appellate court to abdicate any semblance of meaningful [***6] review. Appellate review is more important *because* the Guidelines are no longer mandatory. Under the mandatory Guideline system, appellate review was not integral to assuring uniformity. Now, with the advisory Guidelines and more sentencing variables, appellate review is all the more important in [**17] assuring uniformity and reducing sentencing disparities across the board. *See* S. REP. NO. 98-225, at 151 (1983); *United States v. Mickelson*, - F.3d -, 433 F.3d 1050, 2006 U.S. App. LEXIS 256, 2006 WL 27687 (8th Cir. January 6,

2006).

IV.

Based on the above discussion, we VACATE Foreman's sentence, and REMAND this case for resentencing in light of *Booker*.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LEONARD JERMAIN WILLIAMS, Defendant-Appellant.

No. 05-5416

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

06a0043p.06;
436 F.3d 706; 2006 U.S. App. LEXIS 2304; 2006 FED App. 0043P (6th Cir.)

January 24, 2006, Submitted
January 31, 2006, Decided
January 31, 2006, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Tennessee at Jackson. No. 03-10105. James D. Todd, Chief District Judge.

COUNSEL: ON BRIEF: M. Dianne Smothers, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Memphis, Tennessee, for Appellant.

James W. Powell, ASSISTANT UNITED STATES ATTORNEY, Jackson, Tennessee, for Appellee.

JUDGES: Before: SILER, SUTTON, and COOK, Circuit Judges.

OPINIONBY: COOK

OPINION: [*707] [***1]

COOK, Circuit Judge. Leonard Jermain Williams pleaded guilty to possessing firearms after having been convicted of a felony, in violation of 18 U.S.C. § 922(g). The district court sentenced him, and Williams now asks this court to vacate the sentence as unreasonable. Because the district court reasonably sentenced Williams, we affirm.

I

Following Williams's guilty plea, the probation office prepared a presentence report. The report recommended two Sentencing-Guidelines enhancements because Williams possessed three stolen firearms. Williams objected to the enhancements as based on facts neither admitted by the defendant nor found by a jury, but the court overruled the objections, finding Williams's guilty plea and written statement sufficient [**2] to constitute an admission. [***2]

The district court, "considering the guidelines only in an advisory fashion," concluded that the "range of 57 to 71 months . . . calculated by the probation officer . . . is a reasonable range." The court then imposed a sentence of 64 months:

> The defendant's number of firearms, three, is at the low end of that range, so that would justify a sentence at the low end of his sentencing range. The defendant's criminal history score is at the top of the criminal history category. That would justify a sentence at the top end of the range. Put those two factors together and the court concludes that a sentence near the middle of the sentencing range is an appropriate, reasonable sentence.

II

We must affirm Williams's sentence if it is "reasonable." *United States v. Christopher*, 415 F.3d 590, 594 (6th Cir. 2005). Williams suggests that the district court presumed the Guidelines range to be reasonable, and that this deprived him of a proper integration of the statutory factors found in 18 U.S.C. § 3553(a). His arguments lack merit.

Although several of our sister circuits have concluded that any sentence [**3] within the applicable Guidelines range garners a presumption of reasonableness, n1 [*708] this court has yet to articulate what weight should be accorded the Guidelines relative to the other sentencing factors listed in § 3553(a). *See United States v. Webb*, 403 F.3d 373, 385 n.9 (6th Cir. 2005) (declining "to indicate what weight the district courts must give to the appropriate Guidelines range, or any other § 3553(a) factor"); *see also id.* at 385 (Kennedy, J., dissenting). We now join several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness. Such a presumption comports with the Supreme Court's remedial decision in *Booker*. *See United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 757, 160 L. Ed. 2d 621 (2005) (holding that the modified Federal Sentencing Act "requires a sentencing court to consider Guidelines ranges, but . . . permits the court to tailor the sentence in light of other statutory concerns as well" (citation omitted)).

- - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 *See United States v. Gonzalez*, 134 Fed. Appx. 595, 598 (3d Cir. 2005) (unpublished order) ("Although the Sentencing Guidelines are not mandatory, sentences within the prescribed range are presumptively reasonable."); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) ("The best way to express the new balance, in our view, is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness."); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005); *see also United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005) ("If the sentencing judge exercises her discretion to impose a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines. Given the deference due the sentencing judge's discretion . . . it will be rare for a reviewing court to say such a sentence is 'unreasonable.'").

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**4]

Here, the district court determined that "the advisory nature of the guidelines leads the court to conclude that this range of sentences . . . is a reasonable range." Williams argues from this that the district court improperly presumed the Guidelines range to be reasonable. Assuming we agree with Williams's interpretation, we nonetheless discern no error in light of our holding above.

Williams's related argument-that the district court, in focusing on the Sentencing Guidelines, ignored the remaining factors listed in § 3553(a)-likewise fails. Williams correctly notes that the sentencing judge must consider the list of sentencing factors articulated in 18 U.S.C. § 3553(a). *See United States v. Kirby*, 418 F.3d 621, 626 (6th Cir. 2005). Such consideration, however, need not be evidenced explicitly, and Williams fails to point to any indication that the district court ignored those factors.

In fact, the record demonstrates that the district court did consider § 3553(a) factors. For instance, the court recommended that Williams be allowed to serve his sentence "at an institution [***3] where [he could] get . . . drug treatment and drug [**5] counseling." *See* 18 U.S.C. § 3553(a)(2)

(requiring the court to consider "the need for the sentence imposed . . . to provide the defendant with . . . medical care, or other correctional treatment"). In discussing Williams's inability to pay a fine and in recommending an institution close to West Tennessee so that Williams could be close to his family, the court took into account "the kinds of sentences available." *See id.* § 3553(a)(3); *United States v. Hicks*, 152 Fed. Appx. 803, 809 (11th Cir. 2005) (holding

that the district court, in discussing the defendant's inability to pay a fine, addressed "the kinds of sentences available").

Williams identifies no factor from § 3553(a) that would render his sentence unreasonable; instead he asks the court to conclude that the district court's failure to explicitly discuss each factor rendered his sentence unreasonable. "Although the district court may not have mentioned all of the [§ 3553(a)] factors . . . explicitly, [*709] and although explicit mention of those factors may facilitate review, this court has never required the 'ritual incantation' of the factors to affirm a sentence." *United States v. Johnson*, 403 F.3d 813, 816 (6th Cir. 2005) [**6] (affirming sentence for violation of supervised release terms). "The court need not recite these factors but must articulate its reasoning in deciding to impose a sentence in order to allow for reasonable appellate review." *Kirby*, 418 F.3d at 626 *; see United States v. Contreras-Martinez*, 409 F.3d 1236, 1242 (10th Cir. 2005) ("The sentencing court is not required to consider individually each factor listed in § 3553(a) before issuing a sentence. Moreover, we do not demand that the district court recite any magic words to show that it fulfilled its responsibility to be mindful of the factors that Congress has instructed it to consider.") (quotation omitted); *United States v. Scott*, 426 F.3d 1324, 1329 (11th Cir. 2005) ("We now . . . squarely hold that nothing in *Booker* or elsewhere requires the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors.").

Here, the district court articulated its reasoning sufficiently to permit reasonable appellate review, specifying its reasons for selecting a sentence in the middle of the Guidelines range. [**7] "The record indicates that the district judge carefully reviewed and weighed all the relevant information provided by [Williams], the government, and the probation office before arriving at [Williams's] sentence. As a result, we find nothing in the record that indicates that [Williams's] sentence is an unreasonable one . . . ." *Webb*, 403 F.3d at 385.

III

In the absence of a showing that the district court imposed an "unreasonable" sentence, we affirm.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAYSHEEN SHARP, Defendant-Appellant.

No. 04-4065

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

06a0121p.06;
2006 U.S. App. LEXIS 8138; 2006 FED App. 0121P (6th Cir.)

March 15, 2006, Submitted
April 5, 2006, Decided
April 5, 2006, Filed

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 03-00217-Lesley Brooks Wells, District Judge.

COUNSEL: ON BRIEF: Margaret Amer Robey, Gregory S. Robey, ROBEY & ROBEY, Cleveland, Ohio, for Appellant.

Robert W. Kern, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellee.

JUDGES: Before: COLE, GILMAN, and FRIEDMAN, Circuit Judges. *

* The Honorable Daniel M. Friedman, Circuit Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

OPINIONBY: RONALD LEE GILMAN

OPINION: [**1]

RONALD LEE GILMAN, Circuit Judge. Pursuant to a plea agreement, Raysheen Sharp pled guilty to a charge of conspiracy to make, utter, and possess counterfeit and forged securities. Sharp was subsequently sentenced to 33 months of imprisonment and ordered to pay restitution in the amount of $49,599.74. On appeal, Sharp argues that: (1) he is entitled to be resentenced pursuant to *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), (2) the district court failed to follow *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005), in calculating his criminal history category, [*2] and (3) the district court abused its discretion in calculating the amount of restitution. Sharp does not challenge his conviction.

The government filed a motion to dismiss, arguing that Sharp has waived his right to appeal pursuant to the terms of his plea agreement. Sharp contends, however, that the district court did not [**2] adhere to the requirements of Rule 11 of the Federal Rules of Criminal Procedure when it failed to ascertain that he understood the precise terms of the appellate-waiver provision. For the reasons set forth below, the government's motion to dismiss is **GRANTED**.

I. BACKGROUND

In June of 2003, a federal grand jury in Cleveland, Ohio returned an indictment charging Sharp with one count of conspiracy, in violation of 18 U.S.C. § 371, and various counts of making, uttering, and possessing counterfeit securities of an organization, in violation of 18 U.S.C. § 513. Sharp pled guilty to the conspiracy count in exchange for

he government's agreement to drop the other counts. The plea agreement was accepted by the district court without ıny objection by Sharp. [*3]

Sharp admitted to the following facts in his plea agreement: (1) he knowingly conspired with codefendants Vaden Anderson and Dante Wade, along with eleven other codefendants, to make, utter, and possess counterfeit checks of various organizations with the intent to deceive other persons or organizations, (2) he and his codefendant Wade supervised the conspiracy and recruited other individuals to negotiate counterfeit checks, and (3) as a result of the conspiracy, at least 29 counterfeit checks were negotiated in the greater Cleveland area, causing losses of $49,599.74. Under the terms of the plea agreement, Sharp agreed to cooperate with the government and to testify if any of his codefendants went to trial. The government, in exchange for Sharp's cooperation, agreed to inform the district court of the same, but did not agree to seek a downward departure under United States Sentencing Guidelines § 5K1.1.

Sharp's plea agreement also contains an appellate-waiver provision in paragraph 16 that covers virtually all of his appellate and post-conviction rights. Paragraph 16 reads as follows:

> Defendant acknowledges having been advised by counsel of [*4] Defendant's rights, in limited circumstances, to appeal the conviction or sentence in this case, including the appeal right conferred by 18 U.S.C. § 3742, and to challenge the conviction or sentence collaterally through a post-conviction proceeding, including a proceeding under 28 U.S.C. § 2255. The Defendant expressly waives those rights, except as reserved below. Defendant reserves the right to appeal: (a) any punishment in excess of the statutory maximum; (b) any punishment to the extent it constitutes an upward departure from the Sentencing Guidelines range deemed most applicable by the Court. Nothing in this paragraph shall act as a bar to the Defendant perfecting any legal remedies Defendant may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct.

During the plea hearing, the district court asked Sharp if he understood the terms of his plea agreement:

> The district court: Did you understand all the terms and words in the agreement?
>
> Sharp: Yes, sir.
>
> The district court: Is there anything that you did not understand?
>
> Sharp: No, [*5] sir.
>
> The district court: And before you signed, did you have the opportunity to discuss it with your attorney?
>
> Sharp: Yes, sir.

The district court then asked the prosecutor to explain the appellate-waiver provision, which the prosecutor summarized in open court in the following words:

> Paragraph 16 of the plea agreement contains a waiver of Mr. Sharp's appellate rights and post-conviction remedies. There are several exceptions retained. First, the [**3] Defendant reserves the right to appeal any punishment in excess of the statutory maximum. Secondly, he reserves the right to appeal any punishment to the extent it would constitute an upward departure from the sentencing guideline range deemed most applicable by the Court, and also, to the extent the Defendant would have any possible claim of ineffective assistance of counsel or prosecutorial misconduct, that is not waived either. Other than those three or four, depending on how you count the last one, your Honor, everything else is waived.

Following the prosecutor's explanation, the district court did not follow up by asking Sharp if he understood the precise terms of the appellate-waiver provision. [*6] Instead, the district court went on to explicitly question Sharp about the waiver of his right to a jury trial, his right to confront witnesses, and his right against self-incrimination. The district court, finding that Sharp's guilty plea was "made voluntarily with a full understanding of all possible consequences," accepted the plea. Sharp was later sentenced to 33 months of imprisonment, followed by three years of supervised release, and ordered to pay restitution in the amount of $49,599.74. On appeal, Sharp argues that the appellate-waiver provision is invalid because the district court did not ensure that he understood the implications of that particular provision, and that, even if valid, he has not waived the right to challenge the district court's restitution order.

II. ANALYSIS

A. Sharp's appellate-waiver provision is enforceable

This court has held that "a defendant in a criminal case may waive any right, even a constitutional right, by means of a plea agreement." *United States v. McGilvery*, 403 F.3d 361, 362 (6th Cir. 2005) (holding that the court lacked jurisdiction to consider McGilvery's appeal because he had waived his appellate rights [*7] in the plea agreement) (citation and quotation marks omitted). Rule 11(b) of the Federal Rules of Criminal Procedure requires that the district court "address the defendant personally in open court . . . [and] inform the defendant of, and determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Pursuant to Rule 11, then, a waiver is effective only if understood by the defendant. *United States v. Murdock*, 398 F.3d 491, 495-97 (6th Cir. 2005) (holding that the district court committed plain error where there was no mention of the appellate-waiver provision in open court until after sentencing).

Sharp complains that the district court did not comply with Rule 11 when it relied on the prosecutor to summarize the appellate-waiver provision and when it failed to specifically ascertain whether Sharp understood the provision in the plea agreement. Because Sharp did not object below, his appeal is subject to plain-error review. *Id.* at 496. This court has summarized the "four distinct analyses" of the plain-error inquiry [*8] under Rule 52(b) of the Federal Rules of Criminal Procedure as follows:

> First, we are to consider whether an error occurred in the district court. Absent any error, our inquiry is at an end. However, if an error occurred, we then consider if the error was plain. If it is, then we proceed to inquire whether the plain error affects substantial rights. Finally, even if all three factors exist, . . . we must decide whether the plain error affecting substantial rights seriously affected the fairness, integrity or public reputation of judicial proceedings.

United States v. Thomas, 11 F.3d 620, 630 (6th Cir. 1993) (interpreting *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)); *see also United States v. Jones*, 108 F.3d 668, 670 (6th Cir. 1997) (en banc) (describing *Thomas* 's division of the plain-error inquiry as "four distinct, though interrelated, analyses"). We must decide at the outset, then, whether, as Sharp contends, the district court [**4] committed an error when it relied on the prosecutor to summarize the appellate-waiver provision and when it failed [*9] to specifically ask Sharp whether he understood the provision.

During the plea hearing, the district court asked Sharp if he understood the terms of the plea agreement generally, but the court did not ask a follow-up question specifically targeted at the appellate-waiver provision after the provision was summarized by the prosecutor. Sharp contends that the district court's omission, combined with Sharp's lack of education and lack of sophistication with the criminal justice system, renders the appellate-waiver provision unenforceable.

He relies on the following language from *Murdock*, 398 F.3d at 498, where this court held that the district court's

ıilure to discuss the appellate-waiver provision was plain error, to argue that Sharp's waiver provision is also nenforceable:

> In the absence of a discussion of the appellate waiver provision in open court, we will not rely on a defendant's self-assessment of his understanding of a plea agreement in determining the knowingness of that plea, even where, as the government emphasizes is the case here, the defendant is sophisticated or has significant experience with the criminal justice system.

Murdock [*10] , however, is easily distinguishable because there was *no* mention of the appellate-waiver provision in)pen court. *Id.* at 497. Here, the waiver provision was fully explained during the plea hearing by the prosecutor.

Rule 11 of the Federal Rules of Criminal Procedure requires "the court" to inform the defendant of the waiver, but this :ourt in *United States v. Wilson*, 438 F.3d 672, 674 (6th Cir. 2006), has recently reaffirmed that an explanation of the appellate-waiver provision by the prosecutor is sufficient to satisfy Rule 11 so long as the court ascertains that the defendant understands the provision. In *Wilson*, the district court asked the prosecutor to explain the terms of the plea agreement to the defendant. *Id.* The prosecutor proceeded to explain the terms, including the appellate-waiver provision, and the district court did not supplement the prosecutor's explanation of the appellate-waiver provision with any further detail. *Id.*

Despite the district court's reliance on the prosecutor to explain the various provisions of the plea agreement, the *Wilson* court considered the appellate-waiver [*11] provision enforceable, holding that "because the terms of the plea agreement were fully explained to defendant in open court, Rule 11(b)(1)(N) was not violated." *Id.*; *see also McGilvery*, 403 F.3d at 362 (holding that McGilvery's waiver was valid when "the prosecutor summarized the terms of the plea agreement and specifically explained that McGilvery agreed to waive his right to appellate review").

In holding the waiver enforceable, the *Wilson* court relied on *Murdock*, a case cited by Sharp as "similar to this one." This court in *Murdock*, although finding plain error where there was no mention of the appellate-waiver provision in open court, nevertheless indicated that, in the absence of such an inquiry by the district court, a prosecutor's summary of the key elements of the plea agreement can be sufficient to prove that the defendant's waiver was knowing and voluntary. 398 F.3d at 498; *see also Wilson*, 438 F.3d at 674 ("Indeed, *Murdock* itself indicated a prosecutor in summarizing the key elements of the agreement might adequately address the waiver.") (citations and quotation marks omitted). The fact, therefore, that [*12] the prosecutor, rather than the district court, summarized the appellate-waiver provision does not constitute error.

Similarly, the district court's failure to inquire specifically as to whether Sharp understood the appellate-waiver provision was not erroneous. In *Wilson*, rather than asking the defendant a direct question regarding the appellate-waiver provision, the district court simply asked whether the "defendant still desired to plead guilty after being advised of all of his rights." *Id.* The district court's failure to ask a specific question regarding the appellate-waiver provision did not render the [**5] provision invalid, the *Wilson* court reasoned, because other evidence in the record indicated that Wilson's plea was knowing and voluntary, and because the appellate-waiver provision was adequately explained to him in open court. *Id.*

Although the district court's inquiry in *Wilson* occurred after the prosecutor explained the appellate-waiver provision, rather than before the explanation as was the case here, this difference is not dispositive. Rule 11 requires that the district court ascertain that the defendant understands the terms of the plea agreement, [*13] but it does not require that the district court ask a particular question about the appellate-waiver provision. We recognize that the failure to ask a specific question about the waiver could be error if the record is not clear that the defendant understood the provision as required by Rule 11. Here, however, we find the record is sufficient to indicate that Sharp understood the terms of the plea agreement. Not only did Sharp sign the agreement, but he also testified in open court that he understood its terms and had ample opportunity to discuss it with his attorney.

Our other cases also instruct us that Sharp's waiver of his appellate rights was valid. In *Murdock*, for example, this

ɔurt opined that even in the absence of a specific inquiry about the appellate-waiver provision, other evidence of oluntariness can suffice to demonstrate that the defendant's waiver of his appellate rights was knowing and voluntary. 98 F.3d at 497-98. The *McGilvery* court went even further, holding an appellate-waiver provision enforceable where there [was] nothing in the record to suggest that . . . the defendant misunderstood the scope of his waiver of appellate ights" - essentially [*14] requiring the defendant to affirmatively establish his misunderstanding. 403 F.3d at 363 citation and quotation marks omitted) (ellipses in original).

n the present case, Sharp has made no such showing. Sharp testified in open court that he had read the plea ıgreement, that he understood its terms, and that he had discussed the agreement with his attorney. He does not dispute his testimony. Instead, Sharp asks us to split hairs and hold that his statement regarding his general understanding of he plea agreement may not be used to demonstrate that he understood its individual provisions. This we refuse to do.

Our cases make clear that the proper inquiry under Rule 11 is whether the defendant was informed of and understood :he terms of the plea agreement. *See Wilson*, 438 F.3d at 674; *Murdock*, 398 F.3d at 497-98. Sharp read the plea agreement, discussed it with his attorney, and does not claim that his attorney's explanation of the appellate-waiver provision was inadequate. The district court satisfied Rule 11 of the Federal Rules of Criminal Procedure by ensuring that the appellate-waiver provision [*15] was discussed in open court and that Sharp understood his plea agreement. We therefore hold that there was no error.

Because Sharp has not demonstrated that the district court committed an error, we have no need to determine whether the alleged error was plain, whether it affected substantial rights, or whether it undermined the integrity of the proceedings. Despite our holding today, however, we nevertheless acknowledge that the district courts could avoid challenges such as the one before us by specifically asking defendants whether they understand the appellate rights that are being waived. Such an inquiry would be well-placed after either the district court or the prosecutor has fully explained the provisions of the plea agreement. We conclude, however, that the district court's failure to do so in this case was not error because other evidence in the record indicates that Sharp was informed of and understood his rights. *See Murdock*, 398 F.3d at 497-98.

B. Sharp cannot appeal the restitution order

Sharp also argues that the appellate-waiver provision does not bar his appeal of the restitution amount. In the plea agreement, Sharp reserved his right [*16] to appeal "(a) any punishment in excess of the statutory maximum[, and] (b) any punishment to the extent it constitutes an upward [**6] departure from the Sentencing Guidelines range deemed most applicable by the Court." Sharp now claims that the district court erred in calculating the losses occasioned by his relevant conduct at $49,599.74-the combined amount lost by all victims of the conspiracy-rather than at $17,418.05, the amount that Sharp admits was lost as the result of his direct actions.

Upon reviewing the two explicit exceptions to the appellate-waiver provision in the plea agreement, we hold that Sharp may not appeal his restitution order. Sharp does not argue that the restitution order constitutes a punishment in excess of the statutory maximum or that it is the result of an upward departure from the applicable Guidelines range. Moreover, even if Sharp had attempted to so argue, his challenge would fail.

This court's key restitution case on point is *United States v. Sosebee*, 419 F.3d 451 (6th Cir. 2005). *Sosebee* held that although "restitution constitutes punishment,. . . the restitution statutes do not specify a statutory maximum." *Id.* at 461. [*17] Because the restitution statutes do not contain a maximum penalty, Sharp cannot be heard to complain that the restitution order violates the statutory maximum for his offense. Furthermore, the restitution order did not constitute a punishment in excess of the Guidelines range deemed applicable by the court. Unlike other penalties, such as imprisonment or supervised release, the amount of restitution ordered or the method of its calculation is not determined by the Guidelines. Because there is no applicable Guidelines range for the amount of restitution, the restitution order could not have constituted an upward departure from such a range.

The appellate-waiver provision in Sharp's plea agreement allowed for only two exceptions, neither of which is met here. If Sharp had wished to reserve his right to appeal the restitution order, he should have negotiated for that right in his plea agreement. Because he did not do so, we cannot reach the merits of his restitution claim.

III. CONCLUSION

For all of the reasons set forth above, the government's motion to dismiss is **GRANTED**.

Final Report on the Impact of United States v. Booker On Federal Sentencing

Ricardo H. Hinojosa
Chair

Ruben Castillo
Vice Chair

William K. Sessions III
Vice Chair

John R. Steer
Vice Chair

Michael E. Horowitz
Commissioner

Beryl A. Howell
Commissioner

Executive Summary

A. INTRODUCTION

This report assesses the impact of *United States v. Booker*[1] on federal sentencing. The report is prepared pursuant to the general statutory authority of the United States Sentencing Commission (the "Commission") under 28 U.S.C. §§ 994-995, and the specific responsibilities enumerated in 28 U.S.C. § 995(a)(14) and (15), which require the Commission to publish data concerning the sentencing process and to collect and systematically disseminate information concerning the actual sentences imposed and the relationship of such sentences to the factors set forth in 18 U.S.C. § 3553(a).

On June 24, 2004, the Supreme Court decided *Blakely v. Washington,*[2] invalidating a sentence imposed under the State of Washington's sentencing guideline system. The Supreme Court held that the Washington guidelines violated the right to trial by jury under the Sixth Amendment of the United States Constitution. Although the Court stated that it expressed no opinion on the federal sentencing guidelines,[3] the decision had an immediate impact on the federal criminal justice system. Following *Blakely*, district and circuit courts voiced varying opinions on the implication of the decision for federal sentencing and no longer uniformly applied the sentencing guidelines.

On January 12, 2005, the Supreme Court decided *Booker,* applying *Blakely* to the federal guideline system and determining that the mandatory application of the federal sentencing guidelines violated the right to trial by jury under the Sixth Amendment. The Court remedied the Sixth Amendment violation by excising the provisions in the Sentencing Reform Act that made the federal sentencing guidelines mandatory, thereby converting the mandatory system that had existed for almost 20 years into an advisory one.

The uniformity that had been a hallmark of mandatory federal guideline sentencing no longer was readily apparent as courts began to address new issues raised by *Booker.* For example, some district courts began to consider only facts proved beyond a reasonable doubt at sentencing, reasoning that *Booker* required this elevated standard. Others continued to apply the preponderance standard generally accepted before *Booker.* Some district courts continued to use settled procedures for imposing sentences; others created new procedures to implement the decision. Some district courts fashioned sentences without any consideration of the applicable guideline range. In fashioning a sentence outside the applicable guideline range, some district courts decided to forego an analysis of whether a departure under the guidelines would be warranted and instead relied only on *Booker* to impose the sentence. The majority of district courts, however, considered the applicable guideline range first, considered guideline departure reasons under the guidelines, and then decided whether consideration of the factors listed in 18 U.S.C. § 3553(a) warranted imposition of an out-of-range sentence. While some of these questions have been answered by the courts of appeal, others remain unresolved.

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[1] 543 U.S. 220 (2005).
[2] 542 U.S. 296 (2004).
[3] *Id.* at 304, n.9.

B. POST-BOOKER APPELLATE JURISPRUDENCE

As Chapter 2 illustrates, the appellate case law remains at an early stage of development. Requirements for the adequacy and specificity of the reasons for sentences provided by sentencing judges are just now beginning to take shape. Appellate jurisprudence setting forth the reasons that will, or will not, be considered reasonable for imposing a sentence outside the guideline range has just begun to emerge. However, the system has begun to settle as the appellate courts decide issues arising after *Booker*. For example, the circuit courts now have uniformly agreed that all post-*Booker* sentencing must begin with calculation of the applicable guideline range. As each respective circuit arrived at this conclusion, the district courts in that circuit began to use more uniform procedures to impose sentences. Six circuits — the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth — now have held that a sentence within the properly calculated guideline range is presumptively reasonable. Only one circuit has concluded that a sentence within the properly calculated guideline range is unreasonable. As appellate jurisprudence evolves, uncertainties are resolved, the system becomes more predictable, and a more complete picture of the impact of *Booker* on federal sentences can be developed.

C. IMPLEMENTATION OF THE ADVISORY GUIDELINE SYSTEM

A lack of uniformity that existed pre-*Booker* in the reporting of sentencing information to the Commission, especially the reporting of reasons for the sentence imposed, was exacerbated post-*Booker*. Statutory amendments made by The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2004[4] required courts to submit sentencing documentation to the Commission, including the statement of reasons for imposing a particular sentence. Courts were not required, however, to use a standard form for reporting those reasons, although the Judicial Conference of the United States had developed a form for such use. The form, including all of its early iterations that existed prior to *Booker,* was not adequate to fully capture sentencing decisions made post-*Booker*.

As will be discussed in further detail in Chapter 3, the Judicial Conference, working closely with the Commission, revised the Statement of Reasons form[5] to encapsulate post-*Booker* changes in the sentencing guideline system. The revised form, approved in June, 2005, allows for a more complete picture of post-*Booker* sentencing practices. However, the revised form was not adopted until 6 months after the decision. Consequently, for the 6-month period preceding adoption of the revised form, courts used old forms, modified the forms, or created their own. Much of the improvement brought by the revised form, therefore, was not immediately realized. Moreover, use of the revised form has not been adopted by all courts. As of the date of this report, approximately two-thirds of the 94 federal districts have implemented use of the revised form to varying degrees.[6]

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[4] Pub. L. No. 108–21, 117 Stat. 650, hereinafter the "PROTECT Act." *See also* 28 U.S.C. § 994(w) and 18 U.S.C. § 3553(c).

[5] *See* Statement of Reasons AO245B (Rev. 06/05), reproduced in Appendix A.

[6] The advisory committee for the Federal Rules of Criminal Procedure has taken steps to impose uniformity with respect to use of the statement of reasons form. *See* Proposed Rules Change to Fed. R. Crim. P. 32 (Judgment)(proposing to amend Rule 32(k) to require courts to use the judgment form, which includes the statement of reasons form, prescribed by the Judicial Conference of the United States). Congress also has taken steps to address this documentation issue through the Patriot Act conference report. *See* sec. 735 of H.Rep. 109–174, Pt. I

Such changes in practice and procedure have had an impact upon the Commission's data collection and analysis. One of the assumptions upon which the Commission's historical analysis of data is based is the relatively uniform application of the guidelines. This assumption is not necessarily valid after *Booker*. The differences in practice and procedure that resulted from *Booker* are not entirely quantifiable, and this impacts the quality of the data collected.

Booker also necessitated changes in the methodology used by the Commission in the collection and analysis of the data. The Commission had to refine the categorization of sentences in relation to the final guideline range.[7] The new methodology implemented in response to *Booker* uses 11 categories designed to collect and report the nuances of sentencing under the advisory guideline system. Despite the Commission's best attempt to devise rigorous and specific categories, the categorization itself has limitations, and incomplete or unclear documentation often makes it difficult to characterize individual cases as falling into these categories. Moreover, because the reliability of any analyses conducted by the Commission directly correlates to the quality of the information collected, the results reported herein may not provide a complete picture of the system's adaptation to advisory guidelines.

D. FINDINGS FROM DATA ANALYSIS

For the reasons described in Part C of this executive summary, some degree of caution should be exercised in drawing conclusions from the post-*Booker* data collected and analyzed thus far. Nevertheless, a number of conclusions reasonably can be drawn and are described in Chapters 4 through 6.

1. National Sentencing Trends

Chapter 4 of this report details the results of the Commission's data analyses of the impact of *Booker* generally on federal sentencing. For ease of discussion, the terms "within-range," "above-range," and "below-range" are used throughout this report to describe sentences in relation to the applicable guideline range. Many of the analyses in Chapter 4 compare historical guideline trends and trends in the post-*Booker* system. In sum, these analyses yielded the following findings:[8]

- The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines. National data show that when within-range sentences and government-sponsored, below-range sentences are combined, the rate of sentencing in conformance with the sentencing guidelines is 85.9 percent. This conformance rate remained stable throughout the year that followed *Booker*. The

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2005 (requiring submission by courts of a "written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission.").

[7] For a comprehensive discussion of the new methodology, *see* Appendix B.

[8] Unless otherwise noted, findings discussed throughout this report are based on data contained in Commission, Special Post-*Booker* Coding Project One Year Report, contained in Appendix D.

conformance rate in the pre-PROTECT Act period was 90.6 percent. The conformance rate in the post-PROTECT Act period was 93.7 percent.[9]

- The severity of sentences imposed has not changed substantially across time. The average sentence length after *Booker* has increased.

- With respect to within-range sentences, patterns for selecting the point at which to sentence within the range are unchanged after *Booker*. Approximately 60 percent of within-range sentences are still imposed at the minimum, or bottom, of the applicable guideline range.

- The rate of imposition of sentences of imprisonment has not decreased. Offenders are still being incarcerated in the vast majority of cases.

- The rate of imposition of above-range sentences doubled to a rate of 1.6 percent after *Booker*.

- The rate of government-sponsored, below-range sentences has increased slightly after *Booker* to a rate of 23.7 percent, with substantial assistance departures accounting for 14.4 percent, Early Disposition Program departures accounting for 6.7 percent, and other government-sponsored downward departures accounting for 2.6 percent.

- The rate of imposition of non-government-sponsored, below-range sentences has increased after *Booker* to a rate of 12.5 percent.

- In approximately two-thirds of cases involving non-government-sponsored, below-range sentences, the extent of the reductions granted are less than 40 percent below the minimum of the range. Courts have granted small sentence reductions, of 9 percent or less, at a higher rate after *Booker* than before. Courts have granted 100 percent sentence reductions, to probation, at a lower rate after *Booker* than before.

- The imposition of non-government-sponsored, below-range sentences often is accompanied by a citation to *Booker* or factors under 18 U.S.C. § 3553(a).

- The use of guideline departure reasons remains prevalent in many cases involving the imposition of non-government-sponsored, below-range sentences, including those citing *Booker* or factors under 18 U.S.C. § 3553(a).

- Multivariate analysis[10] indicates that four factors associated with the decision to impose a below-range sentence are different after *Booker* but not before: the

[9] For purposes of this report, the pre-PROTECT Act period is the 7-month period from October, 2002 through April, 2003. The post-PROTECT Act period is a 13-month period from mid-2003 through mid-2004. The post-*Booker* period is a 1-year period generally in 2005.

application of a mandatory minimum sentence, criminal history points, career offender status, and citizenship. However, most factors associated with this decision are the same after *Booker*.

2. Regional and Demographic Differences in Sentencing Practices

Chapter 5 of this report details the results of the Commission's data analyses of *Booker's* impact on regional and demographic differences in federal sentencing practices. In sum, these analyses yielded the following findings:

- The regional differences in sentencing practices that existed before *Booker* continue to exist. There are varying rates of sentencing in conformance with the guidelines reported by the twelve circuits. Consistent with the national trend, rates of imposition of within-range sentences decreased for each of the twelve circuits following *Booker*.

- Fifty-two of the 94 districts, or 55 percent, have rates of imposition of within-range sentences at or above the national average of 62.2 percent. Forty-two districts have rates of imposition of within-range sentences below the national average. In 34 of these 42 districts, the rates of imposition of government-sponsored, below-range sentences exceed the rates of imposition of other below-range sentences.

- Multivariate analysis conducted on post-*Booker* data reveals that male offenders continue to be associated with higher sentences than female offenders. Such an association is found every year from 1999 through the post-*Booker* period. Associations between demographic factors and sentence length should be viewed with caution because there are unmeasured factors, such as violent criminal history or bail decisions, statistically associated with demographic factors that the analysis may not take into account.

- Multivariate analysis conducted on post-*Booker* data reveals that black offenders are associated with sentences that are 4.9 percent higher than white offenders. Such an association was not found in the post-PROTECT Act period but did appear in 4 of the 7 time periods analyzed from 1999 through the post-*Booker* period.

- Multivariate analysis conducted on post-*Booker* data reveals that offenders of "other" races (mostly Native American offenders) are associated with sentences that are 10.8 percent higher than white offenders. This association also was found in 2 of the 7 time periods from 1999 through the post-*Booker* period.

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[10] Multivariate analysis is one statistical method to measure the effects of policy changes at the aggregate level and to evaluate the potential influence of other factors. The purpose of conducting multivariate analysis is to determine whether any sentencing changes were statistically significant after controlling for relevant factors for which data are available. For a detailed discussion of the multivariate analyses undertaken for this report, *see* Appendix B.

- Multivariate analysis conducted on post-*Booker* data reveals that there is no statistical difference between the sentence length of Hispanic offenders and the sentence length of white offenders.

3. Specific Sentencing Issues

Chapter 6 of this report details the results of the Commission's data analyses of *Booker*'s impact on specific sentencing issues. In sum, these analyses yielded the following findings:

a. Cooperation Reductions without a Government Motion

- Non-government-sponsored, below-range sentences based on the defendant's cooperation with authorities, *i.e.*, below-range sentences granted for substantial assistance without a government motion for such, occur post-*Booker*. Post-*Booker*, there were 258 cases in which cooperation with authorities was given as a reason for the imposition of a non-government-sponsored, below-range sentence. In 28 of these cases, substantial assistance or cooperation with authorities was the only reason cited. In 230 of these cases, it was one of a combination of reasons for the below-range sentence.

b. Sex Offenses

- The average length of sentences for cases sentenced under each of the criminal sexual abuse guidelines has remained fairly constant.

- The rate of imposition of below-range sentences declined for criminal sexual abuse cases post-PROTECT, but increased slightly post-*Booker*. The rate of imposition of below-range sentences in criminal sexual abuse cases is below the rate for all cases post-*Booker*.

- The rate of imposition of below-range sentences for abusive sexual contact cases decreased following the PROTECT Act but increased post-*Booker*.

- The rate of imposition of below-range sentences for cases involving the sexual abuse of a minor decreased post-PROTECT Act but increased post-*Booker*. The increased rate post-*Booker* was less than what the rate had been pre-PROTECT Act.

- The rate of imposition of above-range sentences increased post-*Booker* for criminal sexual abuse offenses and abusive sexual contact offenses but declined for offenses involving the sexual abuse of a minor.

- The majority of below-range sentences in cases involving criminal sexual abuse are imposed for offenders with little or no criminal history.

- Consistent with the trend seen in the national post-*Booker* data for cases overall, the average length of sentences has increased for cases sentenced under the sexual exploitation, *i.e.*, child pornography, guidelines.

- The rate of imposition of below-range sentences for sexual exploitation offenses declined post-PROTECT Act but increased post-*Booker*.

- The rate of imposition of above-range sentences for cases involving production of child pornography decreased post-PROTECT Act but increased post-*Booker*. Above-range sentences have steadily increased for cases involving possession of child pornography.

c. Crack Cocaine Offenses

- Courts do not often appear to be using *Booker* or the factors under 18 U.S.C. § 3353(a) to impose below-range sentences in crack cocaine cases. Courts do not often explicitly cite crack cocaine/cocaine powder sentencing disparity as a reason to impose below-range sentences in crack cocaine cases.

d. First Offenders

- The rate of imposition of below-range sentences for first offenders increased after *Booker*.

- The rate of imposition of above-range sentences for first offenders increased after *Booker*.

- The proportion of first offenders receiving prison sentences has remained essentially the same, as has the average length of sentences imposed.

e. Career Offenders

- The rate of imposition of below-range sentences for career offenders increased after *Booker*. The majority of the cases in which below-range sentences are being imposed for career offenders are drug trafficking cases.

- The average length of sentences imposed for career offenders has decreased after *Booker*. This continues the pattern that existed before *Booker*.

f. Early Disposition Programs

- Sentencing courts in districts without early disposition programs (EDP)[11] report relatively low rates of imposition of below-range sentences. In its 2003 Departure Report, the Commission expressed concern that these districts increasingly might grant below-range sentences to reach outcomes for similarly-situated defendants similar to the outcomes that would be reached in EDP districts. The data do not reflect that these concerns generally have been realized. In districts without EDP, the data do not reflect widespread use of *Booker* to grant below-range sentences to reflect sentences available in EDP districts.

E. CONCLUSION

The Commission intends to continue its outreach and training efforts and to regularly release updated, real-time data on rates of imposition of within-range and out-of-range sentences, types of sentences imposed, average sentence lengths, the reasons judges report for sentencing outside the guidelines system, and the results of sentencing appeals. Uniform and complete statements of reasons and timely reporting to the Commission by the district courts can provide valuable feedback to Congress, the Commission, the courts, and all others in the federal criminal justice community regarding the long-term impact of *Booker* on the federal sentencing system. This report is an important part of the Commission's efforts to inform careful consideration of the evolving post-*Booker* federal sentencing system.

[11] For a detailed discussion of Early Disposition Programs, *see* Chapter 6, Part G of this report.

U.S. Sentencing Commission
Special Post-Booker Coding Project

Information for All Cases

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Cases Sentenced Subsequent to *U.S. v. Booker*
(Data Extraction as of March 16, 2006)

Prepared: March 30, 2006

U.S. SENTENCING COMMISSION
SPECIAL POST-BOOKER CODING PROJECT
DATA EXTRACTION DATE: MARCH 16, 2006

CONTENTS

DEGREE OF DEPARTURE AND VARIANCE

NATIONAL COMPARISON OF SENTENCE IMPOSED AND POSITION RELATIVE TO THE GUIDELINE RANGE

Cases Sentenced Subsequent to *U.S. v. Booker* with Data Available to USSC on March 16, 2006

	N	%
TOTAL[1]	**74,245**	**100.0**
WITHIN GUIDELINE RANGE	**45,829**	**61.7**
DEPARTURE ABOVE GUIDELINE RANGE	**221**	**0.3**
Upward Departure from the Guideline Range[2]	164	0.2
Upward Departure with *Booker*/18 U.S.C. § 3553[3]	57	0.1
OTHERWISE ABOVE THE GUIDELINE RANGE	**1,006**	**1.4**
Above the Range with *Booker*/18 U.S.C. § 3553[4]	522	0.7
All Remaining Cases Above the Guideline Range[5]	484	0.7
GOVERNMENT SPONSORED BELOW RANGE	**17,861**	**24.1**
§5K1.1 Substantial Assistance Departure	10,778	14.5
§5K3.1 Early Disposition Program Departure	5,016	6.8
Government-Sponsored Departure[6]	2,067	2.8
DEPARTURE BELOW GUIDELINE RANGE	**2,399**	**3.2**
Downward Departure from the Guideline Range[2]	1,658	2.2
Downward Departure with *Booker*/18 U.S.C. § 3553[3]	741	1.0
OTHERWISE BELOW THE GUIDELINE RANGE	**6,929**	**9.3**
Below the Range with *Booker*/18 U.S.C. § 3553[4]	4,544	6.1
All Remaining Cases Below the Guideline Range[5]	2,385	3.2

[1]This table reflects the 76,867 cases sentenced subsequent to the *U.S. v. Booker* decision on January 12, 2005, with court documentation cumulatively received, coded, and edited at the U.S. Sentencing Commission by March 16, 2006. Of this total, there are 2,622 cases excluded for one of two general reasons. Some excluded cases involve certain Class A misdemeanors or other offenses which do not reference a sentencing guideline. Other excluded cases have information missing from the submitted documents that prevents the comparison of the sentence and the guideline range. As missing documents are received, subsequent U.S. Sentencing Commission data releases will incorporate the new information.

[2]All cases with imposed sentences outside of the guideline range and citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual.*

[3]All cases with imposed sentences outside of the guideline range citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual,* and additionally mentioning either *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence outside of the guideline range.

[4]All cases with imposed sentences outside of the guideline range mentioning only *U.S. v. Booker,* 18 U.S.C. § 3553, or related factors as a reason for a sentence outside of the guideline range.

[5]Cases with imposed sentences outside of the guideline range that do not fall into the three previous categories. Based on the information submitted on the Statement of Reasons, these cases cannot be classified as a guideline departure, or as a sentence outside the guideline range pursuant to *Booker*/18 U.S.C. § 3553. This category includes cases which cite departure reasons that are not affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and cases which do not provide any reason for the sentence outside of the guideline range.

[6]Cases with a reason for departure indicating that the prosecution initiates, proposes, or stipulates to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant.

SOURCE: U.S. Sentencing Commission, Special Post-*Booker* Coding Project, (data extraction on March 16, 2006; table prepared on March 30, 2006). Summary numbers may not add up to their component parts due to rounding.

MOST FREQUENTLY APPLIED GUIDELINES: COMPARISON OF SENTENCE IMPOSED AND POSITION RELATIVE TO THE GUIDELINE RANGE

Cases Sentenced Subsequent to *US v. Booker* with Data Available to USSC on March 16, 2006

	All Cases		Four Most Frequently Applied Primary Guidelines							
			§2D1.1 Drug Trafficking		§2L1.2 Unlawful Entry		§2K2.1 Firearms		§2B1.1 Theft and Fraud	
	N	%	N	%	N	%	N	%	N	%
TOTAL[1]	**74,245**	**100.0**	**25,662**	**100.0**	**11,575**	**100.0**	**7,247**	**100.0**	**7,647**	**100.0**
WITHIN GUIDELINE RANGE	**45,829**	**61.7**	**13,709**	**53.4**	**6,693**	**57.8**	**5,070**	**70.0**	**5,380**	**70.4**
DEPARTURE ABOVE GUIDELINE	**221**	**0.3**	**19**	**0.1**	**20**	**0.2**	**33**	**0.5**	**24**	**0.3**
Upward Departure from the Guideline Range[2]	164	0.2	15	0.1	14	0.1	25	0.3	15	0.2
Upward Departure with Booker/18 USC §3553[3]	57	0.1	4	0.0	6	0.1	8	0.1	9	0.1
OTHERWISE ABOVE THE RANGE	**1,006**	**1.4**	**137**	**0.5**	**101**	**0.9**	**157**	**2.2**	**199**	**2.6**
Above the Range with Booker/18 USC §3553[4]	522	0.7	64	0.2	62	0.5	78	1.1	110	1.4
All Remaining Cases Above the Guideline Range[5]	484	0.7	73	0.3	39	0.3	79	1.1	89	1.2
GOVERNMENT BELOW GUIDELINE	**17,861**	**24.1**	**8,569**	**33.4**	**3,647**	**31.5**	**896**	**12.4**	**940**	**12.3**
§5K1.1 Substantial Assistance Departure	10,778	14.5	6,704	26.1	88	0.8	684	9.4	802	10.5
§5K3.1 Early Disposition Program Departure	5,016	6.8	1,147	4.5	3,181	27.5	37	0.5	12	0.2
Government-Sponsored Departure[6]	2,067	2.8	718	2.8	378	3.3	175	2.4	126	1.6
DEPARTURE BELOW GUIDELINE	**2,399**	**3.2**	**796**	**3.1**	**372**	**3.2**	**293**	**4.0**	**261**	**3.4**
Downward Departure from the Guideline Range[2]	1,658	2.2	547	2.1	286	2.5	189	2.6	176	2.3
Downward Departure with Booker/18USC §3553[3]	741	1.0	249	1.0	86	0.7	104	1.4	85	1.1
OTHERWISE BELOW THE RANGE	**6,929**	**9.3**	**2,432**	**9.5**	**742**	**6.4**	**798**	**11.0**	**843**	**11.0**
Below the Range with Booker/18 USC §3553[4]	4,544	6.1	1,657	6.5	472	4.1	540	7.4	505	6.6
All Remaining Cases Below the Guideline Range[5]	2,385	3.2	775	3.0	270	2.3	258	3.6	338	4.4

[1]This table reflects the 76,867 cases sentenced subsequent to the *US v. Booker* decision on January 12, 2005, with court documentation cumulatively received, coded, and edited at the U.S. Sentencing Commission by March 16, 2006. Of this total, there are 2,622 cases excluded for one of two general reasons. Some excluded cases involve certain Class A misdemeanors or other offenses which do not reference a sentencing guideline. Other excluded cases have information missing from the submitted documents that prevents the comparison of the sentence and the guideline range. As missing documents are received, subsequent U.S. Sentencing Commission data releases will incorporate the new information.

[2]All cases with imposed sentences outside of the guideline range and citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*.

[3]All cases with imposed sentences outside of the guideline range citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*, and additionally mentioning either *US v. Booker*, 18 USC §3553, or related factors as a reason for a sentence outside of the guideline range.

[4]All cases with imposed sentences outside of the guideline range mentioning only *US v. Booker*, 18 USC §3553, or related factors as a reason for a sentence outside of the guideline range.

[5]Cases with imposed sentences outside of the guideline range that do not fall into the three previous categories. Based on the information submitted on the Statement of Reasons, these cases cannot be classified as a guideline departure, or as a sentence outside the guideline range pursuant to Booker/18 USC §3553. This category includes cases which cite departure reasons that are ***not*** affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and cases which do not provide any reason for the sentence outside of the guideline range.

[6]Cases with a reason for departure indicating that the prosecution initiates, proposes, or stipulates to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, (data extraction on March 16, 2006; table prepared on March 30, 2006). Cases with multiple guideline calculations are classified by the guideline with the highest offense level. Summary numbers may not add up to their component parts due to rounding.

OFFENDERS SENTENCED FOR EACH CHAPTER TWO GUIDELINE[1]

Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on March 16, 2006

Guideline	As Primary Guideline n	As Primary Guideline %	As Any Guideline n	As Any Guideline %
2A1.1	177	0.2	188	0.2
2A1.2	37	0.1	43	0.1
2A1.3	24	0.0	24	0.0
2A1.4	36	0.1	38	0.0
2A1.5	21	0.0	43	0.1
2A2.1	60	0.1	89	0.1
2A2.2	388	0.5	441	0.6
2A2.3	42	0.1	47	0.1
2A2.4	152	0.2	173	0.2
2A3.1	159	0.2	166	0.2
2A3.2	146	0.2	170	0.2
2A3.3	6	0.0	6	0.0
2A3.4	35	0.0	49	0.1
2A4.1	66	0.1	87	0.1
2A4.2	1	0.0	1	0.0
2A5.1	0	0.0	0	0.0
2A5.2	17	0.0	18	0.0
2A5.3	0	0.0	0	0.0
2A6.1	174	0.2	183	0.2
2A6.2	7	0.0	15	0.0
2B1.1	7,811	11.0	8,500	11.0
2B1.2	0	0.0	0	0.0
2B1.3	6	0.0	6	0.0
2B1.4	10	0.0	10	0.0
2B1.5	17	0.0	18	0.0
2B2.1	73	0.1	86	0.1
2B2.2	0	0.0	0	0.0
2B2.3	4	0.0	5	0.0
2B3.1	1,999	2.8	2,138	2.8
2B3.2	54	0.1	81	0.1
2B3.3	15	0.0	21	0.0
2B4.1	58	0.1	62	0.1
2B5.1	600	0.8	639	0.8
2B5.2	0	0.0	0	0.0
2B5.3	155	0.2	167	0.2
2B5.4	0	0.0	0	0.0
2B6.1	14	0.0	16	0.0
2C1.1	238	0.3	267	0.3
2C1.2	27	0.0	27	0.0
2C1.3	12	0.0	12	0.0
2C1.4	2	0.0	2	0.0
2C1.5	0	0.0	0	0.0
2C1.6	1	0.0	1	0.0
2C1.7	38	0.1	45	0.1
2C1.8	5	0.0	6	0.0
2D1.1	26,129	36.6	27,410	35.4
2D1.2	381	0.5	396	0.5
2D1.3	0	0.0	0	0.0
2D1.4	0	0.0	0	0.0
2D1.5	24	0.0	29	0.0
2D1.6	42	0.1	196	0.3
2D1.7	15	0.0	17	0.0
2D1.8	67	0.1	108	0.1
2D1.9	0	0.0	0	0.0
2D1.10	25	0.0	25	0.0
2D1.11	187	0.3	213	0.3
2D1.12	37	0.1	52	0.1
2D1.13	1	0.0	1	0.0
2D2.1	411	0.6	508	0.7
2D2.2	46	0.1	58	0.1
2D2.3	1	0.0	1	0.0
2D3.1	3	0.0	3	0.0
2D3.2	0	0.0	0	0.0
2D3.3	0	0.0	0	0.0
2D3.4	0	0.0	0	0.0
2D3.5	0	0.0	0	0.0
2E1.1	36	0.1	116	0.1
2E1.2	17	0.0	88	0.1
2E1.3	0	0.0	30	0.0
2E1.4	13	0.0	19	0.0
2E1.5	0	0.0	0	0.0
2E2.1	29	0.0	37	0.0
2E3.1	122	0.2	144	0.2
2E3.2	0	0.0	0	0.0
2E3.3	0	0.0	0	0.0
2E4.1	26	0.0	35	0.0
2E5.1	12	0.0	16	0.0
2E5.2	0	0.0	0	0.0
2E5.3	3	0.0	9	0.0
2E5.4	0	0.0	0	0.0
2E5.5	0	0.0	0	0.0
2E5.6	0	0.0	0	0.0
2F1.1	1,266	1.8	1,339	1.7
2F1.2	7	0.0	8	0.0
2G1.1	67	0.1	119	0.2
2G1.2	1	0.0	1	0.0
2G1.3	91	0.1	100	0.1
2G2.1	109	0.2	127	0.2
2G2.2	602	0.8	623	0.8
2G2.3	0	0.0	0	0.0
2G2.4	428	0.6	471	0.6
2G2.5	1	0.0	1	0.0
2G3.1	14	0.0	19	0.0
2G3.2	0	0.0	0	0.0
2H1.1	52	0.1	57	0.1
2H1.2	0	0.0	0	0.0
2H1.3	0	0.0	0	0.0
2H1.4	0	0.0	0	0.0
2H1.5	0	0.0	0	0.0
2H2.1	18	0.0	20	0.0
2H3.1	11	0.0	14	0.0
2H3.2	3	0.0	3	0.0

(continued)

Guideline	As Primary Guideline n	As Primary Guideline %	As Any Guideline n	As Any Guideline %
2H3.3	12	0.0	16	0.0
2H4.1	10	0.0	10	0.0
2H4.2	0	0.0	0	0.0
2J1.1	0	0.0	29	0.0
2J1.2	135	0.2	187	0.2
2J1.3	69	0.1	100	0.1
2J1.4	16	0.0	31	0.0
2J1.5	2	0.0	2	0.0
2J1.6	61	0.1	80	0.1
2J1.7	147	0.2	156	0.2
2J1.8	0	0.0	0	0.0
2J1.9	0	0.0	0	0.0
2K1.1	4	0.0	5	0.0
2K1.2	0	0.0	0	0.0
2K1.3	49	0.1	52	0.1
2K1.4	67	0.1	90	0.1
2K1.5	13	0.0	14	0.0
2K1.6	1	0.0	1	0.0
2K1.7	0	0.0	0	0.0
2K2.1	7,304	10.2	7,737	10.0
2K2.2	0	0.0	0	0.0
2K2.3	0	0.0	0	0.0
2K2.4	1	0.0	2	0.0
2K2.5	14	0.0	16	0.0
2K2.6	2	0.0	4	0.0
2K3.1	0	0.0	0	0.0
2L1.1	3,518	4.9	3,608	4.7
2L1.2	11,702	16.4	11,850	15.3
2L1.3	0	0.0	0	0.0
2L2.1	412	0.6	445	0.6
2L2.2	1,121	1.6	1,184	1.5
2L2.3	0	0.0	0	0.0
2L2.4	0	0.0	0	0.0
2L2.5	0	0.0	0	0.0
2M1.1	0	0.0	1	0.0
2M2.1	0	0.0	0	0.0
2M2.2	0	0.0	0	0.0
2M2.3	0	0.0	0	0.0
2M2.4	0	0.0	0	0.0
2M3.1	0	0.0	0	0.0
2M3.2	1	0.0	1	0.0
2M3.3	1	0.0	2	0.0
2M3.4	0	0.0	0	0.0
2M3.5	0	0.0	0	0.0
2M3.6	0	0.0	0	0.0
2M3.7	0	0.0	0	0.0
2M3.8	0	0.0	0	0.0
2M3.9	0	0.0	0	0.0
2M4.1	0	0.0	0	0.0
2M5.1	11	0.0	15	0.0
2M5.2	28	0.0	31	0.0
2M5.3	7	0.0	9	0.0
2M6.1	14	0.0	14	0.0
2M6.2	1	0.0	1	0.0
2N1.1	2	0.0	2	0.0
2N1.2	2	0.0	2	0.0
2N1.3	0	0.0	0	0.0
2N2.1	34	0.0	63	0.1
2N3.1	1	0.0	3	0.0
2P1.1	238	0.3	264	0.3
2P1.2	92	0.1	117	0.2
2P1.3	14	0.0	14	0.0
2P1.4	0	0.0	0	0.0
2Q1.1	0	0.0	0	0.0
2Q1.2	55	0.1	57	0.1
2Q1.3	43	0.1	43	0.1
2Q1.4	0	0.0	0	0.0
2Q1.5	0	0.0	0	0.0
2Q1.6	0	0.0	0	0.0
2Q2.1	113	0.2	116	0.1
2Q2.2	0	0.0	0	0.0
2R1.1	18	0.0	20	0.0
2S1.1	1,101	1.5	1,196	1.5
2S1.2	26	0.0	32	0.0
2S1.3	296	0.4	329	0.4
2S1.4	0	0.0	0	0.0
2T1.1	554	0.8	676	0.9
2T1.2	0	0.0	0	0.0
2T1.3	1	0.0	1	0.0
2T1.4	134	0.2	147	0.2
2T1.5	0	0.0	0	0.0
2T1.6	16	0.0	18	0.0
2T1.7	0	0.0	0	0.0
2T1.8	0	0.0	0	0.0
2T1.9	26	0.0	39	0.1
2T2.1	0	0.0	1	0.0
2T2.2	0	0.0	0	0.0
2T3.1	37	0.1	42	0.1
2T3.2	0	0.0	0	0.0
2T4.1	0	0.0	0	0.0
2X1.1	152	0.2	1,443	1.9
2X2.1	0	0.0	53	0.1
2X3.1	123	0.2	143	0.2
2X4.1	511	0.7	523	0.7
2X5.1	0	0.0	53	0.1

Total number of guidelines applied:	**77,393**
Number of cases with at least one guideline applied:	**71,296**

[1]Of the 76,867 cases, 5,571 were excluded due to missing guideline applied. The total for any guideline can exceed that for primary guideline because a case can have several guidelines applied, but only one primary guideline.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted March 16, 2006; table prepared March 30, 2006). Summary numbers may not add up to their component parts due to rounding.

GUIDELINE OFFENDERS IN EACH CIRCUIT AND DISTRICT[1]

Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on March 16, 2006

CIRCUIT District	Number	Percent
TOTAL	**76,867**	**100.0**
D.C. CIRCUIT	**553**	**0.7**
District of Columbia	553	0.7
FIRST CIRCUIT	**1,749**	**2.3**
Maine	262	0.3
Massachusetts	525	0.7
New Hampshire	219	0.3
Puerto Rico	593	0.8
Rhode Island	150	0.2
SECOND CIRCUIT	**4,416**	**5.7**
Connecticut	442	0.6
New York		
Eastern	1,258	1.6
Northern	411	0.5
Southern	1,426	1.9
Western	659	0.9
Vermont	220	0.3
THIRD CIRCUIT	**3,515**	**4.6**
Delaware	173	0.2
New Jersey	1,013	1.3
Pennsylvania		
Eastern	1,075	1.4
Middle	655	0.9
Western	479	0.6
Virgin Islands	120	0.2
FOURTH CIRCUIT	**6,995**	**9.1**
Maryland	800	1.0
North Carolina		
Eastern	702	0.9
Middle	473	0.6
Western	659	0.9
South Carolina	1,129	1.5
Virginia		
Eastern	1,831	2.4
Western	684	0.9
West Virginia		
Northern	362	0.5
Southern	355	0.5

CIRCUIT District	Number	Percent
FIFTH CIRCUIT	**16,750**	**21.8**
Louisiana		
Eastern	392	0.5
Middle	205	0.3
Western	433	0.6
Mississippi		
Northern	205	0.3
Southern	366	0.5
Texas		
Eastern	821	1.1
Northern	1,090	1.4
Southern	7,221	9.4
Western	6,017	7.8
SIXTH CIRCUIT	**5,796**	**7.5**
Kentucky		
Eastern	577	0.8
Western	415	0.5
Michigan		
Eastern	805	1.0
Western	449	0.6
Ohio		
Northern	1,148	1.5
Southern	695	0.9
Tennessee		
Eastern	708	0.9
Middle	353	0.5
Western	646	0.8
SEVENTH CIRCUIT	**3,356**	**4.4**
Illinois		
Central	409	0.5
Northern	1,186	1.5
Southern	335	0.4
Indiana		
Northern	463	0.6
Southern	323	0.4
Wisconsin		
Eastern	422	0.5
Western	218	0.3

(continued)

CIRCUIT District	Number	Percent
EIGHTH CIRCUIT	**5,522**	**7.2**
Arkansas		
Eastern	305	0.4
Western	233	0.3
Iowa		
Northern	400	0.5
Southern	362	0.5
Minnesota	631	0.8
Missouri		
Eastern	1,074	1.4
Western	872	1.1
Nebraska	907	1.2
North Dakota	267	0.3
South Dakota	471	0.6
NINTH CIRCUIT	**14,520**	**18.9**
Alaska	223	0.3
Arizona	4,497	5.9
California		
Central	1,709	2.2
Eastern	977	1.3
Northern	711	0.9
Southern	2,646	3.4
Guam	136	0.2
Hawaii	529	0.7
Idaho	267	0.3
Montana	407	0.5
Nevada	484	0.6
Northern Mariana Islands	26	0.0
Oregon	599	0.8
Washington		
Eastern	409	0.5
Western	900	1.2

CIRCUIT District	Number	Percent
TENTH CIRCUIT	**6,313**	**8.2**
Colorado	747	1.0
Kansas	710	0.9
New Mexico	2,896	3.8
Oklahoma		
Eastern	108	0.1
Northern	229	0.3
Western	334	0.4
Utah	1,053	1.4
Wyoming	236	0.3
ELEVENTH CIRCUIT	**7,382**	**9.6**
Alabama		
Middle	248	0.3
Northern	497	0.6
Southern	387	0.5
Florida		
Middle	1,826	2.4
Northern	374	0.5
Southern	2,368	3.1
Georgia		
Middle	490	0.6
Northern	798	1.0
Southern	394	0.5

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted March 16, 2006; table prepared March 31, 2006). Summary numbers may add up to their component parts due to rounding.

Guideline Application Trends, National and Circuit

Fiscal Years 2001, 2002, 2003, Pre-Blakely FY2004, and Post-Booker FY2005-06[1]
(Post-Booker data extracted March 16, 2006)

NATIONAL

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	64.0%	65.0%	69.4%	72.2%	61.7%
Upward Departures	0.6%	0.8%	0.8%	0.8%	0.3%[2]
Otherwise Above Range	—	—	—	—	1.4%[3]
Substantial Assistance Departures	17.1%	17.4%	15.9%	15.5%	14.5%
Other Gov't Sponsored Departures	—	—	6.3%[4]	6.4%	9.5%[4]
Other Downward Departures	18.3%[5]	16.8%[5]	7.5%	5.2%	3.2%[2]
Otherwise Below Range	—	—	—	—	9.3%[3]

DC CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	74.6%	59.9%	64.6%	59.2%	52.6%
Upward Departures	0.4%	0.5%	0.2%	1.0%	0.2%[2]
Otherwise Above Range	—	—	—	—	2.4%[3]
Substantial Assistance Departures	13.8%	31.1%	26.4%	31.3%	23.0%
Other Gov't Sponsored Departures	—	—	4.4%[4]	3.9%	9.0%[4]
Other Downward Departures	11.2%[5]	8.5%[5]	4.4%	4.7%	2.8%[2]
Otherwise Below Range	—	—	—	—	10.1%[3]

FIRST CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	73.3%	75.7%	77.3%	79.6%	65.1%
Upward Departures	0.4%	0.6%	0.7%	0.9%	0.4%[2]
Otherwise Above Range	—	—	—	—	2.2%[3]
Substantial Assistance Departures	14.6%	14.4%	13.5%	13.8%	12.1%
Other Gov't Sponsored Departures	—	—	0.7%[4]	0.5%	2.5%[4]
Other Downward Departures	11.7%[5]	9.3%[5]	7.8%	5.2%	4.2%[2]
Otherwise Below Range	—	—	—	—	13.6%[3]

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Guideline Application Trends, National and Circuit

Fiscal Years 2001, 2002, 2003, Pre-Blakely FY2004, and Post-Booker FY2005-06[1]

SECOND CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	57.5%	61.3%	63.2%	63.8%	49.8%
Upward Departures	0.4%	0.6%	0.5%	0.9%	0.2%[2]
Otherwise Above Range	—	—	—	—	1.0%[3]
Substantial Assistance Departures	21.7%	19.0%	17.5%	19.2%	22.5%
Other Gov't Sponsored Departures	—	—	2.8%[4]	2.5%	2.9%[4]
Other Downward Departures	20.4%[5]	19.1%[5]	16.0%	13.6%	6.8%[2]
Otherwise Below Range	—	—	—	—	16.9%[3]

THIRD CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	60.2%	58.9%	62.3%	62.6%	51.3%
Upward Departures	0.5%	0.9%	0.9%	0.6%	0.2%[2]
Otherwise Above Range	—	—	—	—	1.2%[3]
Substantial Assistance Departures	30.6%	32.3%	28.8%	30.3%	27.9%
Other Gov't Sponsored Departures	—	—	0.6%[4]	0.8%	1.8%[4]
Other Downward Departures	8.8%[5]	7.9%[5]	7.4%	5.8%	4.0%[2]
Otherwise Below Range	—	—	—	—	13.6%[3]

FOURTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	73.7%	76.6%	77.0%	79.0%	67.0%
Upward Departures	0.9%	0.7%	0.6%	1.0%	0.3%[2]
Otherwise Above Range	—	—	—	—	1.4%[3]
Substantial Assistance Departures	20.2%	18.6%	18.3%	16.7%	17.7%
Other Gov't Sponsored Departures	—	—	0.3%[4]	0.3%	1.3%[4]
Other Downward Departures	5.2%[5]	4.2%[5]	3.8%	3.0%	2.5%[2]
Otherwise Below Range	—	—	—	—	9.8%[3]

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Guideline Application, National and Circuit

Fiscal Years 2001, 2002, 2003, Pre-Blakely FY2004, and Post-Booker FY2005-06[1]

FIFTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	69.1%	71.0%	73.7%	80.2%	72.0%
Upward Departures	0.5%	0.9%	0.9%	0.8%	0.2%[2]
Otherwise Above Range	—	—	—	—	1.6%[3]
Substantial Assistance Departures	12.3%	13.4%	12.5%	10.3%	7.9%
Other Gov't Sponsored Departures	—	—	5.4%[4]	5.2%	9.8%[4]
Other Downward Departures	18.1%[5]	14.7%[5]	7.5%	3.5%	2.5%[2]
Otherwise Below Range	—	—	—	—	6.0%[3]

SIXTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	65.1%	66.9%	69.1%	69.7%	57.6%
Upward Departures	0.5%	0.8%	0.4%	0.5%	0.1%[2]
Otherwise Above Range	—	—	—	—	1.3%[3]
Substantial Assistance Departures	27.2%	26.0%	24.6%	24.3%	25.2%
Other Gov't Sponsored Departures	—	—	0.5%[4]	0.4%	1.8%[4]
Other Downward Departures	7.3%[5]	6.3%[5]	5.3%	5.1%	2.9%[2]
Otherwise Below Range	—	—	—	—	11.0%[3]

SEVENTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	71.0%	69.3%	72.5%	75.4%	63.9%
Upward Departures	1.0%	0.8%	1.0%	1.3%	0.3%[2]
Otherwise Above Range	—	—	—	—	1.1%[3]
Substantial Assistance Departures	21.2%	21.8%	21.2%	19.0%	16.8%
Other Gov't Sponsored Departures	—	—	0.8%[4]	0.8%	2.7%[4]
Other Downward Departures	6.9%[5]	8.1%[5]	4.5%	3.6%	3.5%[2]
Otherwise Below Range	—	—	—	—	11.8%[3]

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Guideline Application Trends By Circuit

Fiscal Years 2001, 2002, 2003, Pre-Blakely FY2004, and Post-Booker FY2005-06[1]

EIGHTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	66.8%	69.3%	72.2%	77.0%	64.5%
Upward Departures	0.7%	1.2%	1.1%	0.9%	0.3%[2]
Otherwise Above Range	—	—	—	—	1.6%[3]
Substantial Assistance Departures	22.0%	18.9%	17.6%	15.3%	14.4%
Other Gov't Sponsored Departures	—	—	2.0%[4]	2.1%	4.1%[4]
Other Downward Departures	10.5%[5]	10.7%[5]	7.1%	4.7%	3.3%[2]
Otherwise Below Range	—	—	—	—	11.8%[3]

NINTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	50.1%	48.8%	59.6%	61.8%	47.6%
Upward Departures	0.4%	0.7%	1.1%	0.8%	0.5%[2]
Otherwise Above Range	—	—	—	—	1.1%[3]
Substantial Assistance Departures	10.7%	11.8%	10.2%	10.6%	10.6%
Other Gov't Sponsored Departures	—	—	19.2%[4]	20.4%	28.1%[4]
Other Downward Departures	38.7%[5]	38.7%[5]	9.9%	6.5%	3.5%[2]
Otherwise Below Range	—	—	—	—	8.6%[3]

TENTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	65.0%	66.6%	73.1%	73.9%	65.0%
Upward Departures	0.7%	0.6%	0.6%	0.7%	0.1%[2]
Otherwise Above Range	—	—	—	—	0.9%[3]
Substantial Assistance Departures	11.0%	11.0%	9.4%	10.3%	9.6%
Other Gov't Sponsored Departures	—	—	11.4%[4]	10.7%	14.2%[4]
Other Downward Departures	23.3%[5]	21.9%[5]	5.5%	4.5%	3.1%[2]
Otherwise Below Range	—	—	—	—	7.1%[3]

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Guideline Application Trends By Circuit

Fiscal Years 2001, 2002, 2003, Pre-Blakely FY2004, and Post-Booker FY2005-06[1]

ELEVENTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2001	FY2002	FY2003	FY2004 (Pre-Blakely)	FY2005-06 (Booker)
Within Range	72.1%	70.2%	74.5%	74.7%	68.8%
Upward Departures	0.6%	0.7%	0.8%	0.8%	0.4%[2]
Otherwise Above Range	—	—	—	—	1.6%[3]
Substantial Assistance Departures	19.9%	22.4%	19.9%	21.0%	17.9%
Other Gov't Sponsored Departures	—	—	0.3%[4]	0.2%	1.0%[4]
Other Downward Departures	7.5%[5]	6.7%[5]	4.5%	3.3%	2.6%[2]
Otherwise Below Range	—	—	—	—	7.8%[3]

[1]In 2003, the Commission augmented its data coding procedures to determine the proportion of non-substantial assistance downward departures that were sponsored by the government. Data prior to 2003 does not distinguish non-substantial assistance government initiated downward departures from other downward departures. In this table, data from FY2001and 2002 on "Other Downward Departures" combines both government sponsored and non-government sponsored downward departures. For FY2003 and FY2004, the "Other Downward Departures" data distinguishes departures that were sponsored by the government from those not sponsored by the government. For example, using the national data, 6.3% of downward departures were government sponsored and 7.5% were other downward departures; the combination of these values (13.8%) is directly comparable to the data for "Other Downward Departures" from the preceding years. For FY2004, this table reflects only cases sentenced prior to the *Blakely v Washington* decision on June 24, 2004. For FY2005-06, this table reflects cases sentenced subsequent to the *U.S. v Booker* decision on January 12, 2005, with court documentation cumulatively received, coded, and edited at the U.S. Sentencing Commission by March 16, 2006. In these cases, a further distinction is made among below guideline range sentences. The data report three categories of below range sentences: those sponsored by the government; those not sponsored by the government and citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*; and those mentioning only *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence outside of the guideline range. Cases citing both reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and mentioning *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors are included in the "Other Downward Departures" category.

[2]Includes cases with imposed sentences outside of the guideline range and citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and all cases with imposed sentences outside of the guideline range citing reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual*, and additionally mentioning either *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence outside of the guideline range.

[3]Includes cases with imposed sentences outside of the guideline range mentioning only *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence outside of the guideline range and all cases with imposed sentences outside of the guideline range that do not fall into the previous category. This category includes cases which cite departure reasons that are ***not*** affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal *Guidelines Manual* and cases which do not provide any reason for the sentence outside of the guideline range.

[4]Cases with a reason for departure indicating that the prosecution initiates, proposes, or stipulates to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant. Note that §5K3.1 (Early Disposition Program) cases are included in this category.

[5]Includes cases in which the below range sentence was sponsored by the government and those not sponsored by the government. Prior to FY2003, the Commission did not code this distinction.

SOURCE: U.S. Sentencing Commission *Sourcebook of Federal Sentencing*, FY2001 through FY2003, Table 26; U.S. Sentencing Commission 2004 Fiscal Year Data File, USSCFY04, Pre-Blakely Only Cases (October 1, 2003 through June 24, 2004); Special Post-Booker Coding Project, (data extracted March 16, 2006; table prepared March 30, 2006). Percents may not sum to 100 percent due to rounding.

Distribution of Offenders Receiving Sentencing Options for the Most Frequently Applied Guidelines

FY 2000-2003, Pre-Blakely FY 2004, and Post-Booker FY 2005-2006 (data extracted March 16, 2006)

	FY 2000		FY 2001		FY 2002		FY 2003		Pre-Blakely FY 2004		Post-Booker FY2005-06	
	N	%	N	%	N	%	N	%	N	%	N	%
Drug Trafficking §2D1.1[1]	21,715	100.0	22,608	100.0	24,013	100.0	23,833	100.0	16,955	100.0	25,601	100.0
Prison only[2]	20,422	94.0	21,143	93.5	22,407	93.3	22,455	94.2	16,081	94.9	24,223	94.6
Prison plus confinement conditions[3]	430	2.0	469	2.1	515	2.1	402	1.7	337	2.0	548	2.1
Probation plus confinement conditions[4]	379	1.7	488	2.2	465	1.9	469	2.0	227	1.3	360	1.4
Probation only[5]	484	2.2	508	2.2	626	2.6	507	2.1	310	1.8	470	1.8
Immigration Unlawful Entry §2L1.2[1]	6,341	100.0	5,946	100.0	6,993	100.0	9,167	100.0	7,058	100.0	11,613	100.0
Prison only[2]	6,291	99.2	5,901	99.2	6,952	99.4	9,132	99.6	7,032	99.6	11,533	99.3
Prison plus confinement conditions[3]	10	0.2	14	0.2	7	0.1	11	0.1	10	0.1	24	0.2
Probation plus confinement conditions[4]	1	0.0	1	0.0	0	0.0	2	0.0	0	0.0	2	0.0
Probation only[5]	39	0.6	30	0.5	34	0.5	22	0.2	16	0.2	54	0.5
Firearms §2K2.1[1]	2,997	100.0	3,629	100.0	4,173	100.0	5,425	100.0	4,782	100.0	7,057	100.0
Prison only[2]	2,604	86.9	3,177	87.5	3,680	88.2	4,779	88.1	4,292	89.8	6,329	89.7
Prison plus confinement conditions[3]	104	3.5	141	3.9	158	3.8	174	3.2	128	2.7	218	3.1
Probation plus confinement conditions[4]	147	4.9	155	4.3	139	3.3	224	4.1	160	3.4	260	3.7
Probation only[5]	142	4.7	156	4.3	196	4.7	248	4.6	202	4.2	250	3.5
Theft/Fraud §2B1.1 or §2F1.1[1]	9,015	100.0	8,768	100.0	9,243	100.0	9,606	100.0	6,909	100.0	8,782	100.0
Prison only[2]	4,253	47.2	4,339	49.5	4,531	49.0	4,803	50.0	3,574	51.7	4,724	53.8
Prison plus confinement conditions[3]	1,077	11.9	1,053	12.0	959	10.4	840	8.7	629	9.1	808	9.2
Probation plus confinement conditions[4]	1,540	17.1	1,481	16.9	1,421	15.4	1,463	15.2	997	14.4	1,153	13.1
Probation only[5]	2,145	23.8	1,895	21.6	2,332	25.2	2,500	26.0	1,709	24.7	2,097	23.9

[1]Sections report only cases with one single guideline application using the indicated guideline. Cases receiving only monetary sentences are excluded.

[2]Prison only cases receive straight prison time.

[3]Prison plus confinement cases receive a combination of prison time and alternative confinement time as defined in USSG §5C1.1.

[4]Probation plus confinement cases receive, as a condition of probation, alternative confinement time as defined in USSG §5C1.1.

[5]Probation only cases receive straight probation time.

SOURCE: U.S. Sentencing Commission, 2000-2003 Fiscal Year Datafiles, USSCFY00-USSCFY03; 2004 Fiscal Year Datafile, USSCFY04, Pre-Blakely Only Cases (October 1, 2003 through June 24, 2004); Special Post-Booker Coding Project (data extraction on March 16, 2006; table prepared March 30, 2006).
Numbers may not sum to 100 percent due to rounding.

Average and Median Sentence Imposed[1] for the Most Frequently Applied Guidelines

Fiscal Year 2000 and Fiscal Year 2001

	Fiscal Year 2000				Fiscal Year 2001			
	Average Months	Median Months	GL Median[2]	N	Average Months	Median Months	GL Median[2]	N
All Cases (one guideline computation)[3]	**50**	**30**		**51,342**	**50**	**30**		**51,809**
Drug Trafficking §2D1.1[4]	**72**	**50**	**60**	**21,715**	**70**	**48**	**60**	**22,608**
Prison only[5]	74	57	63	20,422	72	51	60	21,143
Prison plus confinement conditions[6]	21	10	21	430	29	10	18	469
Probation plus confinement conditions[7]	6	6	12	379	6	6	12	488
Probation only[8]	0	0	—	484	0	0	—	508
Immigration Unlawful Entry §2L1.2[4]	**36**	**33**	**46**	**6,341**	**35**	**30**	**46**	**5,946**
Prison only[5]	36	33	33	6,291	35	30	46	5,901
Prison plus confinement conditions[6]	21	10	10	10	20	10	12	14
Probation plus confinement conditions[7]	—	—	—	1	—	—	—	1
Probation only[8]	0	0	—	39	0	0	—	30
Firearms §2K2.1[4]	**53**	**37**	**37**	**2,997**	**52**	**37**	**37**	**3,629**
Prison only[5]	57	37	41	2,604	56	40	41	3,177
Prison plus confinement conditions[6]	23	10	12	104	22	10	15	141
Probation plus confinement conditions[7]	7	6	12	147	6	6	12	155
Probation only[8]	0	0	—	142	0	0	—	156
Theft/Fraud §2B1.1 or §2F1.1[4]	**14**	**10**	**10**	**9,015**	**15**	**10**	**12**	**8,768**
Prison only[5]	19	15	15	4,253	20	15	15	4,339
Prison plus confinement conditions[6]	9	8	8	1,077	9	8	8	1,053
Probation plus confinement conditions[7]	5	6	6	1,540	5	6	6	1,481
Probation only[8]	0	0	—	2,145	0	0	—	1,895

[1]Sentence data report the sum of imprisonment and any type of confinement as defined in USSG §5C1.1.

[2]For the guideline range of the sentencing table applied to the case, the lower value of the sentencing range.

[3]All statistics in the table report data for cases with one single guideline computation for the specified fiscal year. The "All Cases" row reports all cases regardless of the one guideline applied. Cases receiving only monetary sentences are excluded.

[4]Each guideline-specific section reports only cases with one single guideline application using the indicated guideline.

[5]Prison only sentence categories report straight prison time.

[6]Prison plus confinement sentence categories report the sum of prison time and alternative confinement time as defined in USSG §5C1.1.

[7]Probation plus confinement categories report statistics for cases receiving, as a condition of probation, alternative confinement time as defined in USSG §5C1.1.

[8]Probation only categories report cases receiving straight probation time. By definition, the confinement time is zero months for these cases.

SOURCE: U.S. Sentencing Commission, 2000 and 2001 Fiscal Year Datafiles, USSCFY00 and USSCFY01.

Average and Median Sentence Imposed[1] for the Most Frequently Applied Guidelines

Fiscal Year 2002 and Fiscal Year 2003

	Fiscal Year 2002				Fiscal Year 2003			
	Average Months	Median Months	GL Median[2]	N	Average Months	Median Months	GL Median[2]	N
All Cases (one guideline computation)[3]	**51**	**30**		**55,856**	**52**	**30**		**60,786**
Drug Trafficking §2D1.1[4]	**71**	**51**	**60**	**24,013**	**77**	**57**	**63**	**23,833**
Prison only[5]	74	57	57	22,407	79	60	70	22,455
Prison plus confinement conditions[6]	22	10	10	515	20	10	15	402
Probation plus confinement conditions[7]	6	6	6	465	6	6	12	469
Probation only[8]	0	0	—	626	0	0	—	507
Immigration Unlawful Entry §2L1.2[4]	**30**	**27**	**30**	**6,993**	**28**	**24**	**27**	**9,167**
Prison only[5]	30	27	30	6,952	28	24	27	9,132
Prison plus confinement conditions[6]	20	10	10	7	22	10	10	11
Probation plus confinement conditions[7]	—	—	—	0	—	—	—	2
Probation only[8]	0	0	—	34	0	0	—	22
Firearms §2K2.1[4]	**53**	**37**	**37**	**4,173**	**56**	**37**	**37**	**5,425**
Prison only[5]	57	37	37	3,680	59	41	41	4,779
Prison plus confinement conditions[6]	18	10	12	158	21	10	12	174
Probation plus confinement conditions[7]	6	6	12	139	6	6	12	224
Probation only[8]	0	0	—	196	0	0	—	248
Theft/Fraud §2B1.1 or §2F1.1[4]	**16**	**10**	**12**	**9,243**	**16**	**12**	**12**	**9,606**
Prison only[5]	20	15	15	4,531	21	16	18	4,803
Prison plus confinement conditions[6]	9	10	10	959	9	10	10	840
Probation plus confinement conditions[7]	6	6	6	1,421	6	6	6	1,463
Probation only[8]	0	0	—	2,332	0	0	—	2,500

[1]Sentence data report the sum of imprisonment and any type of confinement as defined in USSG §5C1.1.

[2]For the guideline range of the sentencing table applied to the case, the lower value of the sentencing range.

[3]All statistics in the table report data for cases with one single guideline computation for the specified fiscal year. The "All Cases" row reports all cases regardless of the one guideline applied. Cases receiving only monetary sentences are excluded.

[4]Each guideline-specific section reports only cases with one single guideline application using the indicated guideline.

[5]Prison only sentence categories report straight prison time.

[6]Prison plus confinement sentence categories report the sum of prison time and alternative confinement time as defined in USSG §5C1.1.

[7]Probation plus confinement categories report statistics for cases receiving, as a condition of probation, alternative confinement time as defined in USSG §5C1.1.

[8]Probation only categories report cases receiving straight probation time. By definition, the confinement time is zero months for these cases.

SOURCE: U.S. Sentencing Commission, 2002 and 2003 Fiscal Year Datafiles, USSCFY02 and USSCFY03.

Average and Median Sentence Imposed[1] for the Most Frequently Applied Guidelines

Pre-Blakely FY 2004 and Post-Booker FY 2005-2006 (data extracted March 16, 2006)

	Pre-Blakely FY 2004				Post-Booker FY2005-06			
	Average Months	Median Months	GL Median[2]	N	Average Months	Median Months	GL Median[2]	N
All Cases (one guideline computation)[3]	**56**	**33**		**44,895**	**55**	**33**		**68,528**
Drug Trafficking §2D1.1[4]	**83**	**60**	**70**	**16,955**	**83**	**60**	**70**	**25,601**
Prison only[5]	86	60	70	16,081	86	63	78	24,223
Prison plus confinement conditions[6]	22	10	12	337	18	10	21	548
Probation plus confinement conditions[7]	6	6	12	227	6	6	12	360
Probation only[8]	0	0	—	310	0	0	—	470
Immigration Unlawful Entry §2L1.2[4]	**29**	**24**	**24**	**7,058**	**27**	**24**	**24**	**11,613**
Prison only[5]	29	24	24	7,032	27	24	24	11,533
Prison plus confinement conditions[6]	40	34	29	10	17	10	15	24
Probation plus confinement conditions[7]	—	—	—	0	—	—	—	2
Probation only[8]	0	0	—	16	0	0	—	54
Firearms §2K2.1[4]	**59**	**40**	**41**	**4,782**	**58**	**37**	**37**	**7,057**
Prison only[5]	63	42	46	4,292	61	41	41	6,329
Prison plus confinement conditions[6]	21	10	10	128	25	10	12	218
Probation plus confinement conditions[7]	6	6	10	160	7	6	12	260
Probation only[8]	0	0	—	202	0	0	—	250
Theft/Fraud §2B1.1 or §2F1.1[4]	**19**	**12**	**12**	**6,909**	**20**	**12**	**15**	**8,782**
Prison only[5]	25	18	18	3,574	26	18	21	4,724
Prison plus confinement conditions[6]	9	10	10	629	10	10	10	808
Probation plus confinement conditions[7]	6	6	6	997	6	6	6	1,153
Probation only[8]	0	0	—	1,709	0	0	—	2,097

[1]Sentence data report the sum of imprisonment and any type of confinement as defined in USSG §5C1.1.

[2]For the guideline range of the sentencing table applied to the case, the lower value of the sentencing range.

[3]All statistics in the table report data for cases with one single guideline computation for the specified fiscal year. The "All Cases" row reports all cases regardless of the one guideline applied. Cases receiving only monetary sentences are excluded.

[4]Each guideline-specific section reports only cases with one single guideline application using the indicated guideline.

[5]Prison only sentence categories report straight prison time.

[6]Prison plus confinement sentence categories report the sum of prison time and alternative confinement time as defined in USSG §5C1.1.

[7]Probation plus confinement categories report statistics for cases receiving, as a condition of probation, alternative confinement time as defined in USSG §5C1.1.

[8]Probation only categories report cases receiving straight probation time. By definition, the confinement time is zero months for these cases.

SOURCE: U.S. Sentencing Commission, 2004 Fiscal Year Datafile, USSCFY04 Pre-Blakely Only Cases (October 1, 2003 through June 24, 2004); Special Post-Booker Coding Project (data extraction on March 16, 2006; table prepared March 30, 2006).

POST-BOOKER DEPARTURE/VARIANCE RATE BY CIRCUIT AND DISTRICT[1]
Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on March 16, 2006

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE	%	GOVERNMENT SPONSORED BELOW THE GUIDELINE RANGE	%	DEPARTURES BELOW THE GUIDELINE RANGE	%	OTHERWISE BELOW THE GUIDELINE RANGE	%	DEPARTURES ABOVE THE GUIDELINE RANGE	%	OTHERWISE ABOVE THE GUIDELINE RANGE	%
TOTAL	**74,245**	**45,829**	**61.7**	**17,861**	**24.1**	**2,399**	**3.2**	**6,929**	**9.3**	**221**	**0.3**	**1,006**	**1.4**
D.C. CIRCUIT	**544**	**286**	**52.6**	**174**	**32.0**	**15**	**2.8**	**55**	**10.1**	**1**	**0.2**	**13**	**2.4**
District of Columbia	**544**	286	52.6	174	32.0	15	2.8	55	10.1	1	0.2	13	2.4
FIRST CIRCUIT	**1,705**	**1,110**	**65.1**	**249**	**14.6**	**72**	**4.2**	**231**	**13.5**	**6**	**0.4**	**37**	**2.2**
Maine	**258**	187	72.5	54	20.9	6	2.3	9	3.5	0	0.0	2	0.8
Massachusetts	**503**	267	53.1	61	12.1	42	8.3	126	25.0	2	0.4	5	1.0
New Hampshire	**219**	118	53.9	75	34.2	8	3.7	10	4.6	1	0.5	7	3.2
Puerto Rico	**580**	442	76.2	51	8.8	12	2.1	54	9.3	2	0.3	19	3.3
Rhode Island	**145**	96	66.2	8	5.5	4	2.8	32	22.1	1	0.7	4	2.8
SECOND CIRCUIT	**4,329**	**2,155**	**49.8**	**1,100**	**25.4**	**294**	**6.8**	**730**	**16.9**	**8**	**0.2**	**42**	**1.0**
Connecticut	**437**	200	45.8	113	25.9	61	14.0	57	13.0	2	0.5	4	0.9
New York													
Eastern	**1,255**	457	36.4	364	29.0	119	9.5	288	22.9	3	0.2	24	1.9
Northern	**406**	223	54.9	123	30.3	21	5.2	36	8.9	0	0.0	3	0.7
Southern	**1,376**	819	59.5	208	15.1	69	5.0	273	19.8	1	0.1	6	0.4
Western	**635**	347	54.6	218	34.3	6	0.9	58	9.1	2	0.3	4	0.6
Vermont	**220**	109	49.5	74	33.6	18	8.2	18	8.2	0	0.0	1	0.5
THIRD CIRCUIT	**3,459**	**1,776**	**51.3**	**1,028**	**29.7**	**137**	**4.0**	**469**	**13.6**	**7**	**0.2**	**42**	**1.2**
Delaware	**172**	108	62.8	16	9.3	13	7.6	35	20.3	0	0.0	0	0.0
New Jersey	**989**	503	50.9	325	32.9	42	4.2	109	11.0	1	0.1	9	0.9
Pennsylvania													
Eastern	**1,049**	431	41.1	367	35.0	37	3.5	198	18.9	3	0.3	13	1.2
Middle	**654**	301	46.0	256	39.1	21	3.2	62	9.5	3	0.5	11	1.7
Western	**476**	330	69.3	59	12.4	23	4.8	55	11.6	0	0.0	9	1.9
Virgin Islands	**119**	103	86.6	5	4.2	1	0.8	10	8.4	0	0.0	0	0.0
FOURTH CIRCUIT	**6,638**	**4,447**	**67.0**	**1,261**	**19.0**	**164**	**2.5**	**653**	**9.8**	**21**	**0.3**	**92**	**1.4**
Maryland	**767**	378	49.3	235	30.6	40	5.2	100	13.0	3	0.4	11	1.4
North Carolina													
Eastern	**696**	383	55.0	245	35.2	14	2.0	47	6.8	2	0.3	5	0.7
Middle	**472**	350	74.2	63	13.3	9	1.9	46	9.7	0	0.0	4	0.8
Western	**655**	396	60.5	185	28.2	15	2.3	52	7.9	0	0.0	7	1.1
South Carolina	**1,099**	778	70.8	186	16.9	30	2.7	93	8.5	4	0.4	8	0.7
Virginia													
Eastern	**1,562**	1,179	75.5	106	6.8	27	1.7	207	13.3	6	0.4	37	2.4
Western	**681**	422	62.0	170	25.0	12	1.8	63	9.3	3	0.4	11	1.6
West Virginia													
Northern	**358**	291	81.3	33	9.2	8	2.2	23	6.4	0	0.0	3	0.8
Southern	**348**	270	77.6	38	10.9	9	2.6	22	6.3	3	0.9	6	1.7

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE	%	GOVERNMENT SPONSORED BELOW THE GUIDELINE RANGE	%	DEPARTURES BELOW THE GUIDELINE RANGE	%	OTHERWISE BELOW THE GUIDELINE RANGE	%	DEPARTURES ABOVE THE GUIDELINE RANGE	%	OTHERWISE ABOVE THE GUIDELINE RANGE	%
FIFTH CIRCUIT	**16,643**	**11,982**	**72.0**	**2,941**	**17.7**	**419**	**2.5**	**996**	**6.0**	**39**	**0.2**	**266**	**1.6**
Louisiana													
Eastern	**389**	291	74.8	53	13.6	9	2.3	22	5.7	4	1.0	10	2.6
Middle	**205**	131	63.9	49	23.9	2	1.0	10	4.9	2	1.0	11	5.4
Western	**427**	304	71.2	38	8.9	9	2.1	48	11.2	1	0.2	27	6.3
Mississippi													
Northern	**205**	122	59.5	63	30.7	2	1.0	6	2.9	2	1.0	10	4.9
Southern	**355**	289	81.4	33	9.3	8	2.3	17	4.8	0	0.0	8	2.3
Texas													
Eastern	**820**	652	79.5	96	11.7	20	2.4	36	4.4	1	0.1	15	1.8
Northern	**1,087**	805	74.1	130	12.0	17	1.6	77	7.1	3	0.3	55	5.1
Southern	**7,203**	4,685	65.0	1,764	24.5	243	3.4	442	6.1	18	0.2	51	0.7
Western	**5,952**	4,703	79.0	715	12.0	109	1.8	338	5.7	8	0.1	79	1.3
SIXTH CIRCUIT	**5,653**	**3,256**	**57.6**	**1,528**	**27.0**	**165**	**2.9**	**623**	**11.0**	**8**	**0.1**	**73**	**1.3**
Kentucky													
Eastern	**561**	267	47.6	238	42.4	5	0.9	36	6.4	0	0.0	15	2.7
Western	**380**	269	70.8	79	20.8	9	2.4	23	6.1	0	0.0	0	0.0
Michigan													
Eastern	**801**	416	51.9	248	31.0	31	3.9	95	11.9	1	0.1	10	1.2
Western	**449**	293	65.3	74	16.5	15	3.3	56	12.5	2	0.4	9	2.0
Ohio													
Northern	**1,141**	669	58.6	274	24.0	46	4.0	142	12.4	1	0.1	9	0.8
Southern	**673**	328	48.7	214	31.8	27	4.0	94	14.0	0	0.0	10	1.5
Tennessee													
Eastern	**691**	453	65.6	169	24.5	5	0.7	55	8.0	0	0.0	9	1.3
Middle	**325**	188	57.8	76	23.4	14	4.3	44	13.5	1	0.3	2	0.6
Western	**632**	373	59.0	156	24.7	13	2.1	78	12.3	3	0.5	9	1.4
SEVENTH CIRCUIT	**3,320**	**2,120**	**63.9**	**645**	**19.4**	**117**	**3.5**	**391**	**11.8**	**10**	**0.3**	**37**	**1.1**
Illinois													
Central	**402**	243	60.4	82	20.4	12	3.0	61	15.2	1	0.2	3	0.7
Northern	**1,172**	662	56.5	282	24.1	60	5.1	157	13.4	2	0.2	9	0.8
Southern	**334**	278	83.2	19	5.7	9	2.7	21	6.3	3	0.9	4	1.2
Indiana													
Northern	**457**	317	69.4	108	23.6	11	2.4	16	3.5	0	0.0	5	1.1
Southern	**318**	204	64.2	73	23.0	7	2.2	26	8.2	2	0.6	6	1.9
Wisconsin													
Eastern	**422**	227	53.8	73	17.3	15	3.6	97	23.0	2	0.5	8	1.9
Western	**215**	189	87.9	8	3.7	3	1.4	13	6.0	0	0.0	2	0.9
EIGHTH CIRCUIT	**5,485**	**3,538**	**64.5**	**1,013**	**18.5**	**183**	**3.3**	**647**	**11.8**	**18**	**0.3**	**86**	**1.6**
Arkansas													
Eastern	**293**	198	67.6	43	14.7	9	3.1	37	12.6	3	1.0	3	1.0
Western	**231**	159	68.8	54	23.4	4	1.7	13	5.6	0	0.0	1	0.4
Iowa													
Northern	**399**	278	69.7	58	14.5	6	1.5	37	9.3	3	0.8	17	4.3
Southern	**361**	169	46.8	82	22.7	9	2.5	93	25.8	0	0.0	8	2.2
Minnesota	**625**	323	51.7	127	20.3	36	5.8	136	21.8	0	0.0	3	0.5
Missouri													
Eastern	**1,068**	718	67.2	198	18.5	41	3.8	99	9.3	1	0.1	11	1.0
Western	**867**	566	65.3	169	19.5	11	1.3	104	12.0	0	0.0	17	2.0
Nebraska	**906**	594	65.6	190	21.0	47	5.2	67	7.4	0	0.0	8	0.9
North Dakota	**265**	185	69.8	61	23.0	6	2.3	11	4.2	1	0.4	1	0.4
South Dakota	**470**	348	74.0	31	6.6	14	3.0	50	10.6	10	2.1	17	3.6

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE	%	GOVERNMENT SPONSORED BELOW THE GUIDELINE RANGE	%	DEPARTURES BELOW THE GUIDELINE RANGE	%	OTHERWISE BELOW THE GUIDELINE RANGE	%	DEPARTURES ABOVE THE GUIDELINE RANGE	%	OTHERWISE ABOVE THE GUIDELINE RANGE	%
NINTH CIRCUIT	**13,303**	**6,337**	**47.6**	**5,139**	**38.6**	**462**	**3.5**	**1,146**	**8.6**	**67**	**0.5**	**152**	**1.1**
Alaska	**211**	122	57.8	39	18.5	3	1.4	43	20.4	0	0.0	4	1.9
Arizona	**4,284**	1,212	28.3	2,701	63.0	119	2.8	158	3.7	46	1.1	48	1.1
California													
Central	**1,046**	817	78.1	80	7.6	37	3.5	108	10.3	0	0.0	4	0.4
Eastern	**971**	518	53.3	347	35.7	27	2.8	69	7.1	3	0.3	7	0.7
Northern	**691**	418	60.5	145	21.0	29	4.2	88	12.7	1	0.1	10	1.4
Southern	**2,460**	1,297	52.7	867	35.2	124	5.0	158	6.4	4	0.2	10	0.4
Guam	**133**	71	53.4	48	36.1	5	3.8	9	6.8	0	0.0	0	0.0
Hawaii	**523**	254	48.6	163	31.2	22	4.2	74	14.1	0	0.0	10	1.9
Idaho	**264**	101	38.3	124	47.0	11	4.2	24	9.1	1	0.4	3	1.1
Montana	**405**	307	75.8	48	11.9	10	2.5	21	5.2	4	1.0	15	3.7
Nevada	**473**	338	71.5	64	13.5	10	2.1	50	10.6	1	0.2	10	2.1
Northern Mariana Islands	**25**	18	72.0	6	24.0	0	0.0	0	0.0	0	0.0	1	4.0
Oregon	**575**	309	53.7	131	22.8	23	4.0	103	17.9	2	0.3	7	1.2
Washington													
Eastern	**402**	237	59.0	80	19.9	10	2.5	62	15.4	3	0.7	10	2.5
Western	**840**	318	37.9	296	35.2	32	3.8	179	21.3	2	0.2	13	1.5
TENTH CIRCUIT	**6,122**	**3,979**	**65.0**	**1,453**	**23.7**	**189**	**3.1**	**437**	**7.1**	**7**	**0.1**	**57**	**0.9**
Colorado	**725**	381	52.6	217	29.9	42	5.8	75	10.3	2	0.3	8	1.1
Kansas	**706**	456	64.6	149	21.1	15	2.1	71	10.1	2	0.3	13	1.8
New Mexico	**2,862**	1,806	63.1	859	30.0	64	2.2	122	4.3	1	0.0	10	0.3
Oklahoma													
Eastern	**108**	94	87.0	11	10.2	2	1.9	1	0.9	0	0.0	0	0.0
Northern	**229**	187	81.7	27	11.8	1	0.4	9	3.9	1	0.4	4	1.7
Western	**243**	173	71.2	20	8.2	8	3.3	30	12.3	0	0.0	12	4.9
Utah	**1,014**	730	72.0	112	11.0	51	5.0	113	11.1	1	0.1	7	0.7
Wyoming	**235**	152	64.7	58	24.7	6	2.6	16	6.8	0	0.0	3	1.3
ELEVENTH CIRCUIT	**7,044**	**4,843**	**68.8**	**1,330**	**18.9**	**182**	**2.6**	**551**	**7.8**	**29**	**0.4**	**109**	**1.5**
Alabama													
Middle	**247**	147	59.5	87	35.2	2	0.8	7	2.8	3	1.2	1	0.4
Northern	**480**	290	60.4	127	26.5	7	1.5	42	8.8	2	0.4	12	2.5
Southern	**387**	244	63.0	97	25.1	10	2.6	29	7.5	0	0.0	7	1.8
Florida													
Middle	**1,819**	1,173	64.5	438	24.1	58	3.2	126	6.9	2	0.1	22	1.2
Northern	**366**	253	69.1	80	21.9	4	1.1	18	4.9	3	0.8	8	2.2
Southern	**2,240**	1,724	77.0	241	10.8	50	2.2	201	9.0	8	0.4	16	0.7
Georgia													
Middle	**411**	287	69.8	85	20.7	1	0.2	28	6.8	1	0.2	9	2.2
Northern	**771**	503	65.2	133	17.3	35	4.5	84	10.9	5	0.6	11	1.4
Southern	**323**	222	68.7	42	13.0	15	4.6	16	5.0	5	1.5	23	7.1

[1]Of the 76,867 cases, 144 cases with no analogous guidelines were excluded from the table. Of the remaining 76,723 cases, 2,622 were excluded due to missing departure or variance information.
Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted March 16, 2006; table prepared March 30, 2006). Summary numbers may not add up to their component parts due to rounding

SUBSTANTIAL ASSISTANCE CASES: DEGREE OF DEPARTURE FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY[1]

Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on March 16, 2006

			DEGREE OF DECREASE FOR SUBSTANTIAL ASSISTANCE	
PRIMARY OFFENSE	n	Median Sentence in Months[2]	Median Decrease in Months From Guideline Minimum	Median Percent Decrease From Guideline Minimum
TOTAL	**10,286**	**36.0**	**28.3**	**49.0**
Murder	10	126.0	180.0	69.3
Manslaughter	0	--	--	--
Kidnapping/Hostage Taking	5	121.0	127.0	48.5
Sexual Abuse	6	34.5	18.5	35.4
Assault	12	45.0	19.0	27.1
Robbery	177	54.0	31.0	35.4
Arson	11	38.0	24.0	48.1
Drugs - Trafficking	6,614	50.0	39.0	45.2
Drugs - Communication Facility	75	6.0	18.0	83.3
Drugs - Simple Possession	10	25.3	10.0	40.7
Firearms	902	36.0	24.0	46.8
Burglary/B&E	1	--	--	--
Auto Theft	14	22.5	18.0	43.5
Larceny	127	6.0	10.0	60.9
Fraud	1,009	3.0	12.0	89.6
Embezzlement	17	0.0	12.0	100.0
Forgery/Counterfeiting	96	4.0	9.0	82.9
Bribery	62	6.0	15.0	74.4
Tax	90	0.0	10.0	100.0
Money Laundering	238	12.0	23.0	63.4
Racketeering/Extortion	158	28.5	30.0	51.4
Gambling/Lottery	17	0.0	8.0	100.0
Civil Rights	9	15.0	12.0	40.7
Immigration	327	10.0	9.0	48.3
Pornography/Prostitution	56	42.5	26.0	34.7
Prison Offenses	10	2.5	5.0	60.4
Administration of Justice Offenses	139	0.0	12.0	100.0
Environmental/Wildlife	14	0.0	11.0	100.0
National Defense	6	8.5	18.0	80.9
Antitrust	11	5.0	10.0	66.7
Food & Drug	6	0.0	12.0	99.9
Other Miscellaneous Offenses	57	3.0	14.0	83.3

[1]Of the 76,867 cases, 10,778 received a substantial assistance departure. Of these, 10,355 had complete guideline application information. An additional 43 cases were excluded due to several logical criteria. Of the remaining 10,312 cases, 26 were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (26).

[2]Cases with guideline minimums of life or probation (i.e., sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively, but were excluded from measures of decrease in the table.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted March 16, 2006; table prepared March 30, 2006). Summary numbers may not add up to their component parts due to rounding.

GOVERNMENT SPONSORED DOWNWARD DEPARTURE CASES: DEGREE OF DEPARTURE FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY[1]

Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on March 16, 2006

PRIMARY OFFENSE	n	Median Sentence in Months[2]	DEGREE OF DECREASE FOR GOVERNMENT SPONSORED DOWNWARD DEPARTURE[3]	
			Median Decrease in Months From Guideline Minimum	Median Percent Decrease From Guideline Minimum
TOTAL	**6,733**	**24.0**	**9.0**	**27.8**
Murder	3	57.0	40.0	41.0
Manslaughter	0	--	--	--
Kidnapping/Hostage Taking	3	48.0	15.0	23.8
Sexual Abuse	30	60.0	19.0	35.6
Assault	37	19.9	12.0	40.5
Robbery	29	57.0	25.0	31.4
Arson	2	--	--	--
Drugs - Trafficking	1,774	24.0	10.0	33.3
Drugs - Communication Facility	10	11.6	29.4	71.7
Drugs - Simple Possession	1	--	--	--
Firearms	238	30.5	12.0	26.2
Burglary/B&E	1	--	--	--
Auto Theft	1	--	--	--
Larceny	33	0.0	10.0	99.8
Fraud	127	5.0	10.0	60.8
Embezzlement	9	0.0	10.0	99.3
Forgery/Counterfeiting	22	6.4	9.5	49.0
Bribery	8	5.0	9.5	65.8
Tax	15	5.0	10.0	58.3
Money Laundering	34	14.0	6.2	50.0
Racketeering/Extortion	38	38.5	9.0	20.0
Gambling/Lottery	5	0.0	10.0	100.0
Civil Rights	0	--	--	--
Immigration	4,179	24.0	7.0	25.0
Pornography/Prostitution	40	43.0	18.5	21.5
Prison Offenses	9	12.0	6.0	41.7
Administration of Justice Offenses	42	10.0	12.5	61.4
Environmental/Wildlife	4	5.0	7.5	58.3
National Defense	4	24.0	22.0	56.6
Antitrust	0	--	--	--
Food & Drug	3	16.0	12.0	23.3
Other Miscellaneous Offenses	32	0.0	12.0	100.0

[1]Of the 76,867 cases, 7,083 received a government sponsored downward departure. Of these, 6,799 had complete guideline application information. An additional 49 cases were excluded due to several logical criteria. Of the remaining 6,750 cases, 17 were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (17).

[2]Cases with guideline minimums of life or probation (i.e., sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively, but were excluded from measures of decrease in the table.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted March 16, 2006; table prepared March 30, 2006). Summary numbers may not add up to their component parts due to rounding.

OTHER DOWNWARD DEPARTURE CASES: DEGREE OF DEPARTURE FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY[1]

Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on March 16, 2006

			DEGREE OF DECREASE FOR OTHER DOWNWARD DEPARTURE[3]	
PRIMARY OFFENSE	n	Median Sentence in Months[2]	Median Decrease in Months From Guideline Minimum	Median Percent Decrease From Guideline Minimum
TOTAL	**2,247**	**22.1**	**12.0**	**34.3**
Murder	3	70.0	27.0	27.8
Manslaughter	4	24.0	11.0	26.8
Kidnapping/Hostage Taking	0	--	--	--
Sexual Abuse	9	18.0	9.0	19.6
Assault	33	12.0	12.0	50.0
Robbery	69	48.0	18.0	21.6
Arson	1	--	--	--
Drugs - Trafficking	748	60.0	17.5	27.6
Drugs - Communication Facility	11	18.0	10.0	37.5
Drugs - Simple Possession	4	36.0	23.0	48.0
Firearms	304	22.5	12.0	34.8
Burglary/B&E	1	--	--	--
Auto Theft	1	--	--	--
Larceny	54	0.0	8.0	100.0
Fraud	228	1.0	10.0	90.3
Embezzlement	19	3.9	9.0	73.9
Forgery/Counterfeiting	26	2.3	10.0	90.9
Bribery	4	0.0	7.0	100.0
Tax	44	0.0	10.0	100.0
Money Laundering	33	16.0	10.0	44.4
Racketeering/Extortion	20	24.0	12.0	42.5
Gambling/Lottery	2	--	--	--
Civil Rights	2	--	--	--
Immigration	469	24.0	8.0	26.8
Pornography/Prostitution	57	18.0	22.0	48.1
Prison Offenses	8	21.0	5.0	22.4
Administration of Justice Offenses	54	0.1	10.0	99.4
Environmental/Wildlife	4	0.0	12.0	100.0
National Defense	2	--	--	--
Antitrust	1	--	--	--
Food & Drug	0	--	--	--
Other Miscellaneous Offenses	32	1.0	10.0	90.0

[1]Of the 76,867 cases, 2,399 received an other downward departure. Of these, 2,253 had complete guideline application information. An additional two cases were excluded due to several logical criteria. Of the remaining 2,251 cases, four were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (4).

[2]Cases with guideline minimums of life or probation (i.e., sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively, but were excluded from measures of decrease in the table.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted March 16, 2006; table prepared March 30, 2006). Summary numbers may not add up to their component parts due to rounding.

OTHERWISE BELOW GUIDELINE RANGE CASES: DEGREE OF VARIANCE FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY[1]

Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on March 16, 2006

PRIMARY OFFENSE	n	Median Sentence in Months[2]	DEGREE OF DECREASE FOR OTHERWISE BELOW GUIDELINE RANGE[3]: Median Decrease in Months From Guideline Minimum	DEGREE OF DECREASE FOR OTHERWISE BELOW GUIDELINE RANGE[3]: Median Percent Decrease From Guideline Minimum
TOTAL	**6,396**	**24.3**	**12.0**	**34.2**
Murder	10	108.5	25.0	20.5
Manslaughter	3	20.0	10.0	33.3
Kidnapping/Hostage Taking	1	--	--	--
Sexual Abuse	35	34.0	18.0	37.4
Assault	57	12.0	9.0	42.9
Robbery	145	51.0	15.0	20.5
Arson	2	--	--	--
Drugs - Trafficking	2,298	60.0	19.0	26.8
Drugs - Communication Facility	54	13.0	12.0	39.6
Drugs - Simple Possession	17	5.8	10.0	59.5
Firearms	901	30.0	12.0	28.6
Burglary/B&E	7	6.0	6.0	52.4
Auto Theft	6	30.0	7.0	28.2
Larceny	156	0.0	6.0	100.0
Fraud	752	5.0	9.0	67.5
Embezzlement	72	0.0	8.0	99.6
Forgery/Counterfeiting	106	2.9	8.0	77.7
Bribery	27	0.0	10.0	100.0
Tax	139	1.0	10.0	91.9
Money Laundering	137	15.0	12.0	51.4
Racketeering/Extortion	60	45.0	15.0	33.3
Gambling/Lottery	11	0.0	6.0	100.0
Civil Rights	9	28.0	14.5	41.4
Immigration	964	20.0	9.0	33.2
Pornography/Prostitution	189	30.0	17.0	36.8
Prison Offenses	23	12.0	8.0	41.2
Administration of Justice Offenses	105	6.0	10.0	66.1
Environmental/Wildlife	19	0.0	6.0	100.0
National Defense	6	25.5	20.5	36.8
Antitrust	0	--	--	--
Food & Drug	3	5.0	7.0	58.3
Other Miscellaneous Offenses	82	0.0	10.0	100.0

[1]Of the 76,867 cases, 6,929 were otherwise below the guideline range and did not cite reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal Guidelines Manual. Of these, 6,424 had complete guideline application information. An additional 12 cases were excluded due to several logical criteria. Of the remaining 6,412 cases, 16 were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (16).

[2]Cases with guideline minimums of life or probation (i.e., sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively, but were excluded from measures of decrease in the table.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted March 16, 2006; table prepared March 30, 2006). Summary numbers may not add up to their component parts due to rounding.

UPWARD DEPARTURE CASES: DEGREE OF DEPARTURE FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY[1]

Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on March 16, 2006

			DEGREE OF INCREASE FOR UPWARD DEPARTURE[3]	
PRIMARY OFFENSE	n	Median Sentence in Months[2]	Median Increase in Months From Guideline Maximum	Median Percent Increase From Guideline Maximum
TOTAL	**210**	**60.0**	**14.0**	**33.3**
Murder	4	234.0	106.0	65.5
Manslaughter	4	96.0	18.0	23.1
Kidnapping/Hostage Taking	0	--	--	--
Sexual Abuse	5	220.0	32.0	37.8
Assault	10	95.0	31.0	70.9
Robbery	8	175.5	34.0	30.9
Arson	0	--	--	--
Drugs - Trafficking	19	36.0	6.0	22.2
Drugs - Communication Facility	0	--	--	--
Drugs - Simple Possession	2	--	--	--
Firearms	42	96.0	23.5	26.9
Burglary/B&E	1	--	--	--
Auto Theft	0	--	--	--
Larceny	2	--	--	--
Fraud	26	54.0	14.0	48.7
Embezzlement	0	--	--	--
Forgery/Counterfeiting	4	48.0	22.0	120.8
Bribery	0	--	--	--
Tax	0	--	--	--
Money Laundering	3	120.0	57.0	90.5
Racketeering/Extortion	1	--	--	--
Gambling/Lottery	0	--	--	--
Civil Rights	0	--	--	--
Immigration	53	21.0	6.0	25.0
Pornography/Prostitution	14	150.0	56.0	61.7
Prison Offenses	1	--	--	--
Administration of Justice Offenses	8	36.0	6.0	50.0
Environmental/Wildlife	0	--	--	--
National Defense	0	--	--	--
Antitrust	0	--	--	--
Food & Drug	1	--	--	--
Other Miscellaneous Offenses	2	--	--	--

[1]Of the 76,867 cases, 221 received an upward departure. Of these, 213 had complete guideline application information. An additional one cases were excluded due to several logical criteria. Of the remaining 212 cases, two were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (2).

[2]Cases with guideline maximums of life or probation (i.e., sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively, but were excluded from measures of decrease in the table.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted March 16, 2006; table prepared March 30, 2006). Summary numbers may not add up to their component parts due to rounding.

OTHERWISE ABOVE GUIDELINE RANGE CASES: DEGREE OF VARIANCE FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY[1]

Cases Sentenced Subsequent to U.S. v. Booker with Data Available to USSC on March 16, 2006

PRIMARY OFFENSE	n	Median Sentence in Months[2]	DEGREE OF INCREASE FOR OTHERWISE ABOVE GUIDELINE RANGE[3]: Median Increase in Months From Guideline Maximum	DEGREE OF INCREASE FOR OTHERWISE ABOVE GUIDELINE RANGE[3]: Median Percent Increase From Guideline Maximum
TOTAL	**888**	**60.0**	**14.0**	**38.5**
Murder	7	240.0	40.0	21.3
Manslaughter	5	41.0	8.0	24.2
Kidnapping/Hostage Taking	0	--	--	--
Sexual Abuse	20	184.0	38.0	41.3
Assault	29	60.0	27.0	46.3
Robbery	20	174.0	33.5	31.0
Arson	3	84.0	13.0	50.0
Drugs - Trafficking	121	80.0	18.0	33.3
Drugs - Communication Facility	4	29.1	2.1	21.0
Drugs - Simple Possession	15	24.0	12.0	100.0
Firearms	159	72.0	17.0	33.3
Burglary/B&E	2	--	--	--
Auto Theft	5	36.0	18.0	90.5
Larceny	38	30.0	10.5	64.4
Fraud	149	46.0	10.0	33.3
Embezzlement	3	36.0	12.0	46.3
Forgery/Counterfeiting	18	58.5	14.5	74.2
Bribery	0	--	--	--
Tax	7	36.0	9.0	33.3
Money Laundering	13	108.0	20.0	38.7
Racketeering/Extortion	18	81.0	17.0	27.4
Gambling/Lottery	0	--	--	--
Civil Rights	1	--	--	--
Immigration	163	30.0	7.0	37.0
Pornography/Prostitution	45	120.0	33.0	40.0
Prison Offenses	8	42.5	7.5	28.8
Administration of Justice Offenses	21	27.0	10.0	50.0
Environmental/Wildlife	1	--	--	--
National Defense	0	--	--	--
Antitrust	0	--	--	--
Food & Drug	0	--	--	--
Other Miscellaneous Offenses	13	24.0	11.0	50.0

[1]Of the 76,867 cases, 1,006 were otherwise below the guideline range and did not cite reasons for departure limited to, and affirmatively and specifically identified in the provisions, policy statements, or commentary of the federal Guidelines Manual. Of these, 919 had complete guideline application information. An additional 30 cases were excluded due to several logical criteria. Of the remaining 889 cases, one were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (1).

[2]Cases with guideline maximums of life or probation (i.e., sentence lengths of zero months) were included in the sentence average computations as 470 months and zero months respectively, but were excluded from measures of decrease in the table.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted March 16, 2006; table prepared March 30, 2006). Summary numbers may not add up to their component parts due to rounding.

PREPARED STATEMENT
Judge Ricardo H. Hinojosa
Chair, United States Sentencing Commission
before the
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives

March 16, 2006

Chairman Coble, Ranking Member Scott, and distinguished Members of the Subcommittee, thank you for the invitation to testify today on behalf of the United States Sentencing Commission regarding the impact of the Supreme Court's decision in *United States v. Booker*[1] on federal sentencing.

I appeared before this Committee just a few weeks after the *Booker* decision in February 2005, and stated that the *Booker* decision was the most significant case affecting the federal sentencing guidelines system since the Supreme Court upheld the Sentencing Reform Act in *Mistretta*.[2] My testimony this morning will focus on the Commission's activities since the *Booker* decision, particularly our work that culminated in our recently released report on the impact of *Booker*. The Commission remains uniquely positioned to assist all three branches of government in ensuring the continued security of the public while providing fair and just sentences. To fulfill this role, the Commission undertook a detailed review of post-*Booker* sentencing to help inform the ongoing debate about the future of federal sentencing policy. While the full impact of the *Booker* decision still cannot be ascertained from only one year's worth of data, the decision does appear to have had some initial impact on national sentencing practices.

Before I report some of the highlights of our *Booker* Report, I would like to reiterate certain principles I outlined to the Subcommittee last February that the Commission firmly believes still hold true. After *Booker* the Federal Sentencing Guidelines remain an important and essential consideration in the imposition of federal sentences. Under the approach set forth by the Court, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing" subject to review by the courts of appeal for "unreasonableness."[3]

Many courts have adopted, as the Commission teaches, a three-step approach to determining federal sentences under the framework set forth by *Booker*.[4] First, pursuant to 18 U.S.C. § 3553(a)(4), a sentencing court must determine and calculate the applicable guideline sentencing range, since sentencing courts cannot consider the sentencing

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[1] *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005).
[2] *Mistretta v. United States*, 488 U.S. 361 (1989).
[3] *United States v. Booker*, 543 U.S., 124 S. Ct. at 767.
[4] *See, e.g., United States v. Haack*, 403 F.3d 997 (8th Cir.), *cert. denied*, 126 S. Ct. 276 (2005); *United States v. Christenson*, 403 F.3d 1006 (8th Cir. 2005); *see also* Proposed Rules Change to Fed. R. Crim. P. 11 (Pleas)(proposing to amend Rule 11(M) to correspond to the three-step approach to sentencing).

guideline range as required by *Booker* if one has not been determined. Second, the court the court should consider any traditional departure factor that may be applicable under the sentencing guidelines, since 18 U.S.C. § 3553(a)(5), which contemplates consideration of policy statements issued by the Commission, including departure authority remains intact after *Booker*.[5] Third, after consideration of the applicable guideline sentencing range and guideline departure factors, the court should consider the other applicable sentencing factors set forth under 18 U.S.C. § 3553(a) and if the court determines that a guidelines sentence (including any applicable departures) does not meet the purposes of sentencing, it may impose a non-guidelines sentence pursuant to *Booker*.

Although the *Booker* decision makes clear that sentencing courts must consider the guidelines, it does not make clear how much weight sentencing courts should accord the guidelines. The Commission firmly believes that sentencing courts should give substantial weight to the Federal Sentencing Guidelines in determining the appropriate sentence to impose, and that *Booker* should be read as requiring such weight. During the process of developing the initial set of guidelines and refining them throughout the ensuing years, the Commission has considered the very factors listed at section 3553(a) that were cited with approval in *Booker*. Congress in fact mandated that the Commission consider all the factors set forth in 3553(a)(2) when promulgating the guidelines,[6] and they are a virtual mirror image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a).[7]

In addition, Congress through its actions has indicated its belief that the Federal Sentencing Guidelines generally achieve the statutory purposes of sentencing. Pursuant to 28 U.S.C. § 994(p), the Commission is required to submit all guideline and guideline amendments for congressional review before they become effective. To date, the initial set of guidelines and over 680 amendments, many of which where promulgated in response to congressional directives, have withstood congressional scrutiny. Such congressional approval can only be interpreted as a sign that Congress believes the Federal Sentencing Guidelines generally achieve the statutory purposes of sentencing. In short, sentencing courts should give substantial weight to the Federal Sentencing Guidelines as they are the product of years of careful study[8] and represent the integration of multiple sentencing factors.[9]

I. Ongoing Commission Activities

Notably, the *Booker* decision left intact all of the Sentencing Commission's statutory obligations under the Sentencing Reform Act. The Court stated, "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the

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[5] *See United States v. Hughes*, __ F.3d __ 2005 WL 147059 (4th Cir. Jan. 24, 2005) at *3.
[6] *See* 28 U.S.C. § 994(a)(2).
[7] *United States v. Shelton*, 400 F.3d 1325 (11th Cir. 2005).
[8] *United States v. Claiborne*, __ F.3d __, 2006 WL 452899 (8th Cir., Feb. 27, 2006).
[9] *Jimenez-Beltre*, __ F.3d __, 2006 WL 562154.

Guidelines accordingly,"[10] and the Commission has set an aggressive agenda in each of these areas.

In October 2005, the Commission promulgated two emergency amendments. The first addressed intellectual property offenses as directed by Congress in the Family Entertainment and Copyright Act of 2005. The second amendment increased penalties for obstruction of justice offenses involving domestic or international terrorism as directed by the Intelligence Reform Act of 2004. The Commission also made changes during the 2004-2005 amendment cycle to the antitrust and identity theft guidelines.

On January 27, 2006, the Commission published a notice for comment in the *Federal Register* covering fourteen substantive areas of criminal law including, immigration, steroids, intellectual property, and terrorism offenses. To better inform our decision making process, we held two regional hearings on immigration and conducted a public meeting addressing the issue of attorney-client waiver in the Chapter Eight organizational guidelines. We expect to submit amendments covering several of these areas to Congress on May 1, 2006.

The Commission also has increased its training and outreach efforts since *Booker*. In calendar year 2005, commissioners and Commission staff held training programs in all twelve judicial circuits and 61 districts, which resulted in the training of over 9,700 judges, clerks, staff attorneys, probation officers, prosecutors, and defense attorneys.

The Commission also has focused on its statutory duties with regard to data collection, analysis, and reporting. Under the Sentencing Reform Act, the Commission is statutorily charged with being the clearinghouse of federal sentencing statistics,[11] including the systematic collection and dissemination of information about sentences actually imposed.[12] Immediately after the Supreme Court's decision in *Blakely*,[13] which brought uncertainty to the federal sentencing system, the Sentencing Commission sought to refine its data collection and analysis to provide the criminal justice community with "real time" data on sentencing trends. The Commission's data collection was designed for annual reporting, not "real-time" reporting, and moving to real-time data collection continues to require significant resources.

After *Booker*, the Commission categorized sentences into eleven categories[14] designed to capture the nuances taking place in sentencing that previously had not existed. Despite the Commission's best attempt to devise rigorous and specific categories, the categorization itself has limits, and unclear or incomplete documentation submitted to the Commission makes it even more difficult to characterize individual cases as falling into these categories. The Commission relies on documentation

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[10] *Booker* 543 U.S. at 264.
[11] 28 U.S.C. § 994(a)(12).
[12] 28 U.S.C. § 994(a)(14-16).
[13] *Blakely v. Washington*, 542 U.S. 296 (2004).
[14] For a complete description of the eleven categories developed by the Commission after *Booker*, *see* p. D-4 of the *Booker* Report, available at www.ussc.gov.

statutorily required to be sent by the courts under 28 U.S.C. § 994(w)(1): the indictment, written plea (if any), presentence report, judgment and commitment order, and statement of reasons form as the basis of its data files.[15] If the documentation is not complete or is filed untimely, our data files cannot account accurately for what is taking place at sentencing.

The Statement of Reasons is the form adopted by the Judicial Conference of the United States to report the sentencing court's reasons for imposing a particular sentence as statutorily required under 18 U.S.C. § 3553(c).[16] Unfortunately, individual courts are not bound to use the particular adopted form, and over the years the Commission has received many variations. After *Booker* it became evident that the pre-*Booker* form – in all its variations -- was not sufficient to capture sentencing practices in an advisory guidelines system. The Commission worked with the Criminal Law Committee of the Judicial Conference to revise the Statement of Reasons form so that it could capture all the nuanced aspects of sentencing in a post-*Booker* world. That document is relatively new, and as to be expected, the Commission has had some difficulty capturing some of the nuanced sentencing taking place prior to adoption of the form. This difficulty will continue until the form is used uniformly. For example, of the more than 65,000 cases reviewed by the Commission for its *Booker* report, approximately 45,000 of those cases used Statement of Reasons forms issued in December 2003 or thereafter, including the Statement of Reasons form issued in June 2005 in response to *Booker*. Of the remaining 20,000 cases, a variety of forms are being used.

The Commission applauds the advisory committee for the Federal Rules of Criminal Procedure on its efforts to impose uniformity with respect to use of the statement of reasons form.[17] Congress also has taken steps to address this documentation issue through the PATRIOT Act,[18] and the Commission looks forward to working with the Judicial Conference to devise one form to be used uniformly by all courts. More uniform completion of sentencing documentation will ensure that the Commission can continue to inform Congress, the Judiciary, the Executive branch, and the federal criminal justice community about emerging sentencing trends and practices.

II. The Booker Report

The Commission's emphasis on real-time data collection and analysis has enabled it to complete a comprehensive report on the impact of *Booker* in relatively short order. In August 2005, the Commission announced its decision to issue a report to examine

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[15] *See* 28 U.S.C. § 994(w)(1) requiring the chief judge of each court to submit this documentation to the Commission within 30 days of sentencing.

[16] The PROTECT Act amended 18 U.S.C. § 3553(c) to require courts, "at the time of sentencing" to state the reasons for imposing an outside-the-range sentence "with specificity on the written order of judgment and commitment." 18 U.S.C. § 3553(c)(2) (2005).

[17] *See* Proposed Rules Change to Fed. R. Crim. P. 32 (Judgment)(proposing to amend Rule 32(k) to require courts to use the judgment form, which includes the statement of reasons form, prescribed by the Judicial Conference of the United States).

[18] *See*, Sec. 735 of H. Rep. 109-174, Pt I (requiring submission by courts of a "written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission").

whether any initial *Booker* impact could be determined and, if so, to determine the magnitude of such impact. The Commission sought to answer questions in three areas:

(1) Guideline Compliance: Has *Booker* affected the rates of imposition of sentence within and outside the applicable guideline range and, if so, how has it affected sentence type and length, including the extent of departure or variance from the guideline range?

(2) Historical Trends: Has *Booker* affected federal sentencing compared to sentencing practices occurring prior to the decision?

(3) Reasons for Sentences Imposed: In what circumstances do judges find sentences outside the guideline system more appropriate than a guideline sentence? In other words, for what reasons do judges impose non-guidelines sentences and have those reasons changed after *Booker*?

The Commission also sought to examine the appellate courts' responses to *Booker*, particularly whether they were developing case law on what constitutes a "reasonable" sentence.[19]

In compiling this "*Booker* report," the Commission reviewed three relevant time periods to ascertain historical sentencing practices and compare them with post-*Booker* practices:[20] (1) the pre-PROTECT Act period, which covers cases sentenced from October 1, 2002 to April 30, 2003, the date of the PROTECT Act's enactment;[21] (2) the post-PROTECT Act period, which covers cases sentenced between May 1, 2003 and June 24, 2004, the date of the *Blakely* decision; and (3) the post-*Booker* period, which covers cases sentenced between January 12, 2005 and January 11, 2006.

The Commission looked at national sentencing practices as well as sentencing practices for the four major offense types that comprise over 70 percent of the federal caseload: theft/fraud, drug trafficking, firearms, and immigration offenses.[22] The

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[19] *See Jimenez-Beltre*, __ F.3d__, 2006 WL 652154 (1st Cir., Mar. 9, 2006)(en banc)("We have heard this case *en banc* to provide stable guidance in this circuit for the determination and review of post-*Booker* sentences.").

[20] The Commission customarily reports data by fiscal year, which runs October 1 through September 30. The Commission concluded, however, that use of the fiscal year data for its *Booker* report would not lend itself to meaningful analysis.

[21] The Commission chose this seven-month period as representative of pre-PROTECT Act sentencing practices because it was during Fiscal Year 2003 that the Commission refined its methodologies for distinguishing government-sponsored from other downward departures. In its 2003 Departures Report, the Commission estimated the rate of government-sponsored departures for fiscal years prior to 2003. As such, for purposes of the *Booker* report, the Commission chose to report what it felt was the most reliable data available for capturing "pre-PROTECT Act" sentencing practices. *See Booker* Report at 53 n.265 (explaining methodology for determining pre-PROTECT Act period). For purposes of this testimony, other fiscal year estimates will be reported based on information prepared for the 2003 Departures Report, available at www.ussc.gov.

[22] Immigration offenses are broken into two categories: "alien smuggling offenses" sentenced pursuant to USSG §2L1.1 and "unlawful entry offenses" sentenced pursuant to USSG §2L1.2.

Commission also reviewed certain specific classes of offenders and offenses to ascertain post-*Booker* and historical sentencing practices. Because of the limitations set out above about the uniformity of sentencing documentation, some caution should be exercised in drawing certain conclusions from the post-*Booker* data,[23] but some observations can be made.

A. Guideline Conformance

One measurement of *Booker*'s impact on federal sentencing is the rate of sentences imposed in conformance with the guidelines. As indicated in *Booker*, courts must still "consider the Guidelines' sentencing range established for . . . the applicable category of offense committed by the applicable category of defender."[24] This means that the courts must continue to determine and calculate the applicable guideline range, consult the guidelines, and take them into consideration at the time of sentencing, an approach approved by a number of appellate courts.[25]

The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines after *Booker*. The national average for within-range sentences after *Booker* is 62.2 percent. By comparison, in fiscal year 2001 the within-range rate was 64.0 percent and in fiscal year 2002, it was 65.0 percent. In the pre-PROTECT Act period it was 68.3 percent, and post-PROTECT Act, the rate was 71.7 percent.

National data show that when within-range sentences and government-sponsored,[26] below-range sentences are combined, sentencing in conformance with the guidelines is 85.9 percent. This "conformance rate" remained stable throughout the year that followed *Booker*.

The post-*Booker* national conformance rate is comparable to historical sentencing trends, although the degree of comparability depends on the historical period being used for comparison. For example, based on the Commission's estimates of the rates of government-sponsored downward departures prior to 2003 combined with the rates of within-range sentences, the national conformance rate in fiscal year 2001 was 88.4 percent and in fiscal year 2002, it was 88.9 percent. In the pre-PROTECT Act period, the within-range and government-sponsored, below-range conformance rate was 90.6 percent and during the post-PROTECT Act period, it was 93.7 percent.[27]

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[23] For a discussion of the cautions associated with the *Booker* Report's data, *see Booker* Report at v-vi.

[24] *Booker*, 543 U.S. at 259.

[25] *See, e.g.*, *United States v. Vaughn*, 430 F.3d 518 (2nd Cir. 2005); *United States v. White*, 405 F.3d 208, 218 (4th Cir. 2005); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Stone*, 432 F.3d 651 (6th Cir. 2005); *United States v. Rodriguez-Alvarez*, 425 F.3d 1041 (7th Cir. 2005); *United States v. Pizano*, 403 F.3d 991 (8th Cir. 2005); *United States v. Cantrell*, 433 F.3d 1269 (9th Cir. 2006).

[26] Government-sponsored, below-range sentences include sentences outside the range that were made for reasons such as "pursuant to plea," "deportation," and "savings to the government." *See also* discussion on page 20 of the *Booker* Report for more circuit decisions approving this approach to sentencing.

[27] For an illustration of this conformance rate over time, see Figure 3 of the *Booker* Report at 56.

During this Post-*Booker* period, 55 percent of the 94 districts (52) have compliance rates above the national average of 62.2 percent. Government-sponsored, below-range sentences still account for the highest percentage of below range sentences post-*Booker*, and these types of sentences have increased slightly since *Booker* was decided to 23.7 percent. This compares to a rate of 22.3 percent pre-PROTECT Act and 22.0 percent post-PROTECT Act. By way of comparison, the Commission estimates that the rate of government-sponsored, below range sentences in fiscal year 2001 was 24.4 percent and 23.9 percent in fiscal year 2002.[28]

In 34 districts that have a within-range compliance rate lower than the post-*Booker* national average, the reason is directly attributable to a higher percentage of government-sponsored below range sentences.

Commission data also indicate that the pattern of sentencing within-the-range has not changed after *Booker*. Approximately 60 percent of within-range sentences still are imposed at the bottom of the applicable guideline range.

The Commission conducted similar analyses for the four major offense types.[29] In post-*Booker* theft/fraud cases, the conformance rate is 83.0 percent, compared to 93.4 percent pre-PROTECT Act, and 94.0 percent post-PROTECT Act.

For post-*Booker* drug trafficking offenses, the guidelines conformance rate is 86.5 percent compared to 92.6 percent pre-PROTECT Act, and 95.1 percent post-PROTECT Act. The conformance rate for Post-*Booker* firearms offenses is 82.5 percent compared to 88.8 percent pre-PROTECT Act, and 92.3 percent post-PROTECT Act.

Alien-smuggling offenses sentenced after *Booker* demonstrate a conformance rate of 88.5 percent. This rate compares to 86.4 percent pre-PROTECT Act and 92.8 percent post-PROTECT Act. The post-*Booker* compliance rate for unlawful entry offenses is 89.5 percent compared to 88.0 percent pre-PROTECT Act and 93.3 percent post-PROTECT Act.

B. Sentence Length and Type

During the time periods reviewed by the Commission, the severity of sentences did not change. The average sentence length after *Booker* has increased nationally, including in the four major offense types with the exception of unlawful re-entry offenses.

Nationally, sentences in the pre-PROTECT Act period averaged 56 months. During the PROTECT Act period, sentences averaged 57 months. Post-*Booker*, the

[28] This could be viewed as a continuation in the trend toward more government-sponsored below-range sentences. *See* 2003 Departures Report at 31, 67 (discussing trend in increased rates of below-range sentences granted pursuant to USSG §5K1.1 from 1991 through 2001) available at www.ussc.gov.

[29] For reference to the national conformance rates for the four major offense types across time reported in this testimony, *see Booker* Report at E-1.

national average sentence is 58 months. Theft/fraud sentences also have risen throughout these periods averaging 16, 20, and 23 months respectively. Average sentences for drug offenses have risen from 80 months, to 83 months, to 85 months post *Booker*. Average sentences for firearms offenses have held steady at 60, 61, and 60 months. Similarly, average sentences for alien smuggling offenses have held steady at 16, 17, and 17 months post-*Booker*. Only sentences for unlawful re-entry have fallen post-*Booker*. Sentences in these cases averaged 29 months pre-PROTECT Act, 29 months post-PROTECT Act, and 27 months post-*Booker*.

Related to sentence length is the rate of imposition of sentences of imprisonment. According to Commission data, this rate has not decreased since *Booker*. Courts continue to sentence defendants to a term of imprisonment at a rate consistent with trends during the previous time periods examined. Courts also continue to sentence at the bottom of the applicable guideline range in nearly 60 percent of all cases sentenced within the guideline range.

C. Non-Government-Sponsored Outside-the-Range Sentences

The Commission did detect an increase in non-government sponsored, below-range sentences following *Booker*. These are sentences that are below the applicable guideline range and the court has: 1) cited reasons for departure limited to, and affirmatively and specifically identified by the Commission[30] ("departures"); 2) cited reasons for departure limited to, and affirmatively and specifically identified by the Commission, and additionally mentions *Booker* or cites to 18 U.S.C. § 3553(a) ("departure + Booker")[31]; 3) cited only *Booker* or 18 U.S.C. § 3553(a) ("variance")[32]; or 4) not indicated a reason that falls into the previous three categories.[33]

Based on the Commission's best attempts to categorize sentences after *Booker*, the Commission has determined that nationally about 12.5 percent of cases have non-government sponsored, below-range sentences attributable either to guideline departures or *Booker*. By comparison, the non-government sponsored, below-range sentence rate estimated by the Commission for fiscal year 2001 was 11.1 percent and in fiscal year 2002, it was 10.3 percent. During the pre-PROTECT period the rate was 8.6 percent and during the post-PROTECT Act period the rate was 5.5 percent.

Despite this increase in below range sentences from previous time periods, the degree to which sentences are below the range is somewhat smaller than what it was previously. During the post-*Booker* period, the median reduction being granted – either through departures or under *Booker* – is 34.2 percent below the minimum of the range. In fact, since *Booker*, courts have granted sentences 9 percent or less below the minimum of the range more frequently than they did before the decision. By comparison, during

[30] *See Booker* Report at D-4 n.2 for a complete description of this category.
[31] *See Id.* at D-4 n.3.
[32] *See Id.* at D-4 n.4.
[33] *See Id.* at D-4 n.5.

the pre-PROTECT Act period the median reduction was 40.0 percent, and in the post-PROTECT Act period it was 35.1 percent.[34]

Moreover, the rate of imposition of above-range sentences after *Booker* has doubled to 1.6 percent. During fiscal year 2001, it was at 0.6 percent and in fiscal year 2002, it was 0.8 percent. It remained at 0.8 percent throughout the pre- and post-PROTECT Act period. A multivariate analysis undertaken for this report confirmed that the likelihood of receiving an above-range sentence is higher post-*Booker* than pre-*Booker*.

The Commission looked at non-government sponsored, below-range sentences for the four major offense types. For theft/fraud cases, the post-*Booker* non-government sponsored, below-range sentence imposition rate (combining guideline downward departures and sentences based on *Booker*) is 14.2 percent. This compares to a non-government sponsored, below-range sentence imposition rate of 5.8 percent pre-PROTECT Act, and 5.1 percent post-PROTECT Act.

A review of drug trafficking cases demonstrates a non-government sponsored, below-range sentence imposition rate of 12.8 percent after *Booker*. This compares to 7.3 percent pre-PROTECT Act and 4.7 percent post-PROTECT Act.

The non-government sponsored, below-range sentence imposition rate for post-*Booker* firearms cases is 15.2 percent compared to 10.2 percent pre-PROTECT Act and 6.5 percent post-PROTECT Act.

Alien smuggling cases sentenced post-*Booker* demonstrate a non-government sponsored, below-range sentence imposition rate of 9.1 percent compared to 13.1 percent pre-PROTECT Act and 6.6 percent post-PROTECT Act. Unlawful entry cases demonstrate a non-government sponsored, below-range sentence imposition rate 9.5 percent compared to 11.6 percent pre-PROTECT Act and 6.4 percent post-PROTECT Act.

The Commission undertook a review of the reasons courts were giving for the sentences they impose. The Commission's data indicate that even post-*Booker* courts rely predominantly on traditional guidelines departure reasons for imposing an outside-the-range sentence. For guidelines downward departures, courts cite criminal history, general mitigating circumstances, family ties, and aberrant behavior most often to explain a below-range sentence.

For cases in which a court relies solely on *Booker* to sentence below the range, the sentence is most often accompanied by a general citation to the *Booker* decision or factors under 18 U.S.C. § 3553(a) but also may include a citation to traditional guidelines departure reasons. Making up a significant portion of the Commission's "otherwise below the range" category, however, are those cases in which insufficient information in

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[34] *See Booker* Report at 66 (chart explaining median decreases across time for all guidelines and four major offense types).

the documentation made it impossible for the Commission to ascertain what happened at sentencing. The Commission believes that more uniform sentencing documentation will help ensure the Commission's ability to capture what is taking place in courts after *Booker*.

The Commission also undertook a series of multivariate analyses as part of its review of post-*Booker* sentencing. Multivariate analyses are included to assess whether any changes in national sentencing trends are significant after controlling for a number of relevant factors. This is one statistical method employed to measure the effects of policy changes at the aggregate level and to evaluate the potential influence of other factors. The Commission undertook this type of analysis to determine what factors may be statistically significant in post-*Booker* sentencing compared with other time periods.

D. Specific Offense and Offender Issues

The Commission undertook several analyses focused on specific sentencing issues and offender groups that are of perennial interest to the federal criminal justice community, or for which the issue of a *Booker* effect naturally arises. Specifically, the Commission examined sentencing practices regarding the use of cooperation without a government motion as a reason for the imposition of a non-government-sponsored, below-range sentence, sex offenders, crack cocaine offenders, first offenders, career offenders, and the rate of imposition of below-range sentences based on early disposition programs or other "fast track" mechanisms.

1. Cooperation Reduction without a Government Motion

The Department of Justice, in particular, has voiced concern that courts would use *Booker* authority to grant sentence reductions for defendant's cooperation absent a government motion, as outlined in 18 U.S.C. § 3553(e).[35] The Commission reviewed its data to ascertain whether these cases were occurring. The Commission's analysis suggests that these cases do occur post-*Booker*, as they did before *Booker*. The Commission cautions, however, that this data should be considered with the caveat that in many cases, the statement of reasons form may indicate that the court sentenced below the range for cooperation but does not indicate whether or not the government made a motion for substantial assistance. As such, the Commission's data may overstate the frequency with which this type of sentence is occurring.

Commission data indicate that post-*Booker* there were 258 cases in which cooperation with authorities was given as a reason for the imposition of a non-government sponsored, below-range sentence. In 28 of these cases, substantial assistance or cooperation with the government was the only reason cited. In the remaining 230 cases, it was one of a combination of reasons for the below-range sentence. By

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[35] *See* Hearing on: "Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines, before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives (Feb. 10, 2005) (Written Statement of Assistant Attorney General Christopher A. Wray at 15), available at http://judiciary.house.gov/media/pdfs/Wray021005.pdf.

comparison, there were 17 total cases in the pre-PROTECT Act period and 29 total cases in the post-PROTECT Act period.

The Commission compared the extent of reductions below the applicable guideline range in cases where it could determine the government moved for a substantial assistance reduction and cases where there was no motion or the documentation was unclear. In cases with a government motion, the median percent decrease below the applicable range was 50 percent (or 28 months) below the minimum sentence. In cases where there was no motion, or the documentation was not clear, the median percent decrease was 35.1 percent (or 13 months).

2. Sex Offenses

A major impetus for enactment of the PROTECT Act was congressional concern that the rate of downward departures was too great to control and deter crime, particularly sex offenses against children. Since 2003, a number of legislative changes and guideline amendments have increased punishment for these offenses. In order to ascertain sentencing practices post-*Booker*, the Commission divided sex offenses into two categories: 1) criminal sexual abuse offenses, including rape, statutory rape, and inappropriate sexual contact,[36] and 2) sexual exploitation offenses, including crimes related to the production, trafficking, and possession of child pornography.[37]

The Commission notes that with respect to the analysis undertaken for this class of offenses, conclusions are cautionary. Sex offense cases make up a small portion of the national sentencing caseload, and such a small number of cases potentially distorts both the percentages and averages reported. For example, during the pre-PROTECT Act period, the total number of sex offense cases included in the two categories outlined above was 563 cases. During the post-PROTECT Act period the number was 1,206 cases. Post-*Booker* the number of cases was 1,330. Also, the recent changes in the law have resulted in substantial increases in sentences and the full impact of these changes may still be working through the system.

With these caveats, the Commission's data suggest that the average sentence length for cases sentenced pursuant to the criminal sexual abuse guidelines have remained fairly constant. Imposition of below-range sentences declined for overall criminal sexual abuse cases during the post-PROTECT Act period but increased slightly after *Booker*. The rates of imposition of below range sentences for abusive sexual contact cases and sexual abuse of a minor decreased in the post-PROTECT Act period, but increased during the post-*Booker* period. The majority of below-range sentences involving criminal sexual abuse are imposed on offenders with little or no criminal history. The rate of above-range sentences increased after *Booker* for criminal sexual

[36] The criminal sexual abuse category includes offenses sentenced under USSG §§2A3.1 (Rape), 2A3.2 (Statutory Rape), 2A3.4 (Abusive Sexual Contact).

[37] This category of cases includes offenses sentenced under the section G guidelines covering sexual exploitation of a minor, including USSG §§2G2.1 (Production), 2G2.2 (Trafficking), 2G2.4 (Possession).

abuse and abusive sexual contact offenses, but that rate declined for offenses involving sexual abuse of a minor.

Sexual exploitation offenses, like criminal sexual abuse offenses, comprise a small number of federal cases. These cases follow the national trend of increased sentence lengths. In each of the three major classes of offenses – production, trafficking, and possession, sentence lengths have increased. For production offenses, average sentences have increased from 146 to 209 months over the three time periods. Average sentences for trafficking increased from 65 to 92 months over the same time periods, and average sentences for possession increased from 25 to 42 months.

The Commission's data suggest that the rates of below-range sentences in sexual exploitation offenses have increased following *Booker*. For production offenses, the rate of below-range sentences went from 3.8 percent pre-PROTECT Act to 1.8 percent post-PROTECT Act to 11.3 percent post-*Booker*. Similarly, rate of below-range sentences for trafficking offenses increased from 13.7 percent pre-PROTECT Act to 12.2 percent post-PROTECT Act to 19.1 percent post-*Booker*. The rate of below-range sentences for possession offenses also have increased since *Booker*. In the pre-PROTECT Act period the rate was 25 percent. During the post-PROTECT Act period the rate decreased to 12.3 percent but has increased post-*Booker* to 26.3 percent. The rate of imposition of above-range sentences has increased post-*Booker* for possession offenses, but has decreased over time for cases involving production or trafficking in child pornography.

3. Crack Cocaine Offenses

Some have speculated whether courts would use their *Booker* authority to express disapproval of the penalty structure Congress created to address crack and powder cocaine offenses, and the federal sentencing guidelines implementation of that penalty structure. Commission data do not indicate that this is occurring frequently after *Booker*. It does not appear that courts are using *Booker* or other 18 U.S.C. § 3553(a) factors to vary from the penalty structure on a frequent basis. The Commission reviewed 610 crack cocaine cases in which there was a non-government sponsored below-range sentence. In only 35 of those cases did the court indicate specific discontent with the 100-to-1 penalty structure for crack and powder offenses. Commission data indicate that the overwhelming majority of courts are not explicitly citing the crack/powder cocaine disparity as a reason to impose below-range sentences.

Sentencing practices regarding crack offenses generally have followed the same patterns exhibited nationally and within the other major drug types: powder cocaine, heroin, marijuana, and methamphetamine. Following *Booker*, 84.8 percent of crack cases were sentenced in conformance with the guidelines, including government-sponsored below-range sentences. This is comparable to the national sentencing rate of 85.9 percent. Sentence length for crack offenses also has remained fairly stable across time with post-*Booker* sentences averaging 124 months compared to 123 months pre-PROTECT Act and 127 months post-PROTECT Act.

To date, no circuit court has concluded that a policy disagreement with the crack and powder cocaine sentencing ratio is a proper basis for imposing a non-guideline sentence. The First Circuit reviewed a case in which the district court employed a 20-to-1 crack/powder ration, instead of the congressionally mandated 100-to-1 ratio.[38] The First Circuit reversed the decision noting that a district court's general disagreement with broad-based policies enunciated by Congress or the Commission, cannot serve the basis for sentencing outside the applicable guidelines range. The Fourth Circuit also came to a similar conclusion stating that "[i]n arriving at a reasonable sentence, the court simply must not rely on a factor that would result in a sentencing disparity that totally is at odds with the will of Congress."[39]

4. First Offenders

First offenders are defined as those with no prior contact with the criminal justice system whatsoever. The Commission's analysis suggests that the rate of imposition of below-range sentences for first offenders increased after *Booker*. During the pre-PROTECT Act period, first offenders received non-government sponsored, below-range sentences in 9.8 percent of cases. During the post-PROTECT Act period that rate was 6.1 percent. After *Booker*, the rate of non-government sponsored, below-range sentences is 15.2 percent. But the rate of above-range sentences for first offenders also has

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[38] *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006). The First Circuit has agreed to hear this case *en banc*.
[39] *United States v. Eura*, No. 05-4437, 2006 WL 440099 (4th Cir., Feb. 24, 2006).

increased after *Booker* from .7 percent pre-PROTECT Act to 1.2 percent post-*Booker*. Even though first-time offenders are more likely to receive sentences either above or below the guideline range post-*Booker*, the proportion of them receiving imposition of prison time has remained constant. Moreover, the average sentencing length for this class offenders has remained constant: 37 months pre-PROTECT Act period, 39 months post-PROTECT Act period, and 39 months post-*Booker*.

5. Career Offenders[40]

The rate of below-range sentences for career offenders increased after *Booker*, the majority of these sentences being given in drug-trafficking cases. During the pre-PROTECT Act period, the rate of imposition of non-government sponsored, below-range sentences was 10 percent. That rate decreased to 7.3 percent during the post-PROTECT Act period and has increased to 21.5 percent post-*Booker*. Sentence length for career offenders has decreased after *Booker*, which continues a trend that began before *Booker*. The average sentence for career offenders during the pre-PROTECT Act period was 190 months. That average decreased to 189 months during the post-PROTECT Act period and decreased again to 180 months post-*Booker*.

6. Early Disposition Programs

Early disposition or "fast track" programs have existed in some form for a number of years, primarily in the border districts to assist in the burgeoning caseload faced by U.S. Attorneys' offices and the courts. In 2003, as part of the PROTECT Act, Congress formalized these programs by requiring the Attorney General to authorize their existence. Congress also directed the Commission to promulgate a policy statement authorizing a sentence reduction up to four levels if the government filed a motion for such departure pursuant to an early disposition program.

Currently, the Department of Justice has authorized early disposition programs in 16 districts. Some commentators, including the Commission in its 2003 Departures Report, have speculated whether courts that do not have an authorized early disposition program would use their *Booker* authority to grant below-range sentences on par with those that would be given in an early disposition program district. The Commission's data do not reflect that these concerns generally have been realized. In districts without early disposition programs, the data do not reflect widespread use of *Booker* to grant below-range sentences in immigration cases similar to those available in approved early disposition program districts.

The Commission has not identified any reported cases in which circuit courts have upheld sentences below the guidelines range in non-Early Disposition Programs districts, because the district court cited the resulting disparity between districts that qualify for early disposition program departures and those that do not qualify. Two circuits have rejected the defendant's argument that the sentence was unreasonable because the district judge failed to consider the unwarranted disparities in sentencing

[40] The Commission used the guideline definition of career offender for this analysis. *See* USSG §4B1.1.

created by the existence of early disposition programs in other jurisdictions. These circuits explained that the policymaking branches of government can determine that certain disparities are warranted and thus courts need not avoid the disparity created by these programs.

E. Regional and Demographic Differences in Sentencing Practices

The Commission also undertook a review of what impact *Booker* may be having on regional and demographic sentencing practices. Commission data indicate that the regional disparity that existed prior to *Booker* continues to exist. There are varying rates of sentencing in conformance with the guidelines reported by the twelve circuits. Consistent with the national trend, however, rates of imposition of within-range sentences decreased for each of the twelve circuits following *Booker*, both because of an increase in government-sponsored below range sentences and non-government-sponsored, below-range sentences.

The Commission undertook a series of multivariate analyses to ascertain what factors are statistically significant in sentencing post-*Booker* as compared with sentencing in the pre-PROTECT and post-PROTECT Act periods. The conclusions from these analyses are cautionary because although they control for a number of factors associated with sentencing, there exist factors that cannot be measured. Unmeasured factors in the analyses conducted may include, for example, violent criminal history[41] or the bail decision.[42] If these "unmeasured factors" were able to be included in the models, significance of demographic factors might change.

A detailed multivariate analysis conducted on post-*Booker* data demonstrates that male offenders continue to be associated with higher sentences than female offenders. This association was evident every year from 1999 through the post-*Booker* period.

Another multivariate analysis suggests that following *Booker*, black offenders are associated with sentences that are 4.9 percent higher than white offenders. Although this factor did not exist in the post-PROTECT Act period, it did appear in fiscal years 1999, 2000, and 2001.[43]

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[41] The presence of violent criminal history may lead the court to sentence higher in the prescribed range. The Commission's datafile does not have information on the type of criminal history behavior. In 2002, the Commission created a datafile which took a 25 percent random sample of cases sentenced in Fiscal Year 2000. This datafile looked more closely at offender's criminal conduct, including detailed information on the type of criminal history the offender had. Using this data (the Intensive Study Sample 2000, or ISS2000), it was found that 24.4 percent of white offenders had violent criminal history events, as compared to 43.7 percent of black offenders, 18.9 percent of Hispanic offenders, and 23.7 percent of "other" offenders.

[42] Offenders who are not given the opportunity to post bail, or may not be able to afford bail, are detained for the entire period before their sentencing. Thus, if an offender's final sentencing range is 6-12 months, and the offender serves 10 months in prison before the final adjudication of the sentence, the court could sentence the offender to "time served," and the sentence would be 10 months. An offender who was out on bail during this process may get a 6-month sentence for the same behavior, which the court may have wanted to impose on the first offender if the bail circumstances were similar.

[43] *See* Figure 13 of the *Booker* Report at 109.

Another multivariate analysis suggests that following *Booker*, "other" race offenders – primarily Native Americans – are associated with sentences 10.8 percent higher than white offenders. This association also was found in fiscal year 2002.[44]

F. Appellate Review

No discussion about the impact of *Booker* on federal sentencing would be complete without examining the post-*Booker* appellate court decisions interpreting and applying *Booker*. Like the data on sentencing practices, the appellate law surrounding *Booker* continues to evolve. It took the appellate courts several months to wade through the procedural issues associated with *Booker* so it has only been within the last few months that the courts have begun in earnest to develop a post-*Booker* body of case law that gives some guidance about what constitutes an "unreasonable" sentence.

As the Supreme Court specifically stated in *Booker*, district courts must continue to determine and calculate the applicable guidelines range. In doing so, the courts have concluded that determination and calculation of the applicable guideline range continues to include judicial factfinding by the court to resolve disputed issues. Circuits that have ruled on this also have concluded that the resolution of disputed sentencing issues may be done using a preponderance of the evidence burden of proof.[45] The appellate courts also have upheld the post-*Booker* use of hearsay evidence and acquitted conduct when fashioning a sentence in the advisory guidelines scheme.

Courts have concluded that once a guideline range is determined and calculated, it must be considered by the sentencing court. This consideration is part of the sentencing courts overall consideration of the sentencing factors that must be considered in imposing a sentence.[46] The record on appeal must include sufficient evidence to demonstrate affirmatively the court's consideration of these factors, including the applicable guideline sentence.

1. Reasonableness Review

In *Booker*, the Supreme Court instructed the appellate courts to "review sentencing decisions for unreasonableness."[47] The reasonableness standard of review is not particularly clear-cut, having been inferred by Justice Breyer from "statutory language, the structure of the [Sentencing Reform Act], and the 'sound administration of

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[44] *Id.*

[45] *See Booker* Report at 22 *citing United States v. Garcia*, 413 F.3d 201 (2d Cir. 2005); *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005); *United States v. Ledesma*, No. 05-1563, 2005 WL 3477715 (3d Cir. Dec. 20, 2005) (unpub.); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Garcia-Gonon*, 433 F.3d 587 (8th Cir. 2006); *United States v. Tynes*, No. 05-13035, 2005 WL 3536189 (11th Cir. Dec. 28, 2005) (unpub).

[46] *See* 18 U.S.C. § 3553(a) listing the seven factors to be considered when imposing sentence.

[47] *Booker*, 543 U.S. at 264.

justice'."[48] The appellate courts, therefore, have been somewhat cautious in developing guidance on a reasonable sentence.

Six circuits – the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth – have held that a sentence within the applicable guideline range is presumptively reasonable. These circuits declined to find a within-range sentence to be *per se* or conclusively reasonable because, in the view of some, to do so would be "inconsistent with the Supreme Court's decision in *Booker*, as such a standard would effectively re-institute mandatory adherence to the Guidelines.'"[49] This does not mean that a sentence outside the applicable guideline range is presumptively unreasonable, nor does it mean that a guidelines sentence is reasonable in the absence of evidence that a district court followed its statutory mandate to impose a sentence after having considered the applicable sentencing factors under 18 U.S.C. § 3553(a)(2). So far, only one appellate court – the Eighth Circuit -- has found a within-guideline range sentence to be unreasonable.

With respect to guideline departures, the circuit courts agree that after *Booker* they still lack jurisdiction to review a court's denial of a motion for downward departure, if it is clear that the court properly understood the authority to depart and chose not to exercise it.

2. Jurisdiction

Separate and apart from the reasonableness analysis, circuit courts also are examining issues of jurisdiction. Congress provided for limited appellate review of sentences under the Sentencing Reform Act. Prior to *Booker*, neither the government nor the defendant had the right to appeal a sentence properly calculated within the applicable guideline range.[50] *Booker* did not excise this jurisdictional limit on appellate review and some have posited that the appellate courts do not have jurisdiction to hear a post-*Booker* appeal of a within-range guideline sentence. To date, that conclusion has not found support in reported appellate cases. Three circuits – the First, Eighth and Eleventh – have specifically rejected this argument.

As a final note on appellate review, the circuit courts have reasoned that *Booker* does not apply to mandatory minimum sentences, which are driven by statutes, not by the sentencing guidelines. Similarly, the post-*Booker* appellate courts have agreed that the fact of a prior conviction is not a fact that a jury must find beyond a reasonable doubt. Courts, therefore, that have considered the Armed Career Criminal Act have agreed that *Booker* does not have an impact, although they do differ on the extent of the exception.

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[48] *Booker*, 543 U.S. at 260-61, *citing Pierce v. Underwood*, 487 U.S. 552, 559-60.

[49] *See Booker* Report at 26 (citing *United States v. Webb*, 403 F.3d 373, 385 n.9 (6th Cir. 2005) citing *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005). *See also United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006); *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005); *Mykytiuk*, 415 F.3d at 607;*Talley*, 431 F.3d at 786)).

[50] See 18 U.S.C. § 3742(a).

III. Conclusion

The *Booker* decision has had an impact on federal sentencing. The magnitude of the impact depends on to which historical period one compares post-*Booker* sentencing practices. The Commission's review of historical sentencing practices does not indicate whether the post-PROTECT Act trend toward increased conformance with the guidelines system would have continued without *Booker*. Nor does it indicate that, absent the PROTECT Act, the rate of conformance with the guidelines would have decreased.

The Commission commends the Congress and the Department of Justice for the period of time they have allowed post-*Booker* sentencing to occur before considering what, if any, legislative action should be taken in response to the decision.

After a year of collecting data, monitoring appellate court decisions, and having issued its *Booker* report, the Commission believes that it is time for serious consideration of a legislative response to *Booker*. As anticipated by the decision itself:

> Ours of course is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system compatible with the Constitution that Congress judges best for the federal system of justice.[51]

The Commission strongly believes that any legislation considered should preserve the core principles of the bipartisan Sentencing Reform Act of 1984 in a constitutionally sound fashion. The Commission believes that, at the very least, a legislative response to *Booker* should include the following four adjustments, all of which can be made within the Sentencing Reform Act.

First, a legislative response should include codification of the three-step process for imposing a sentence. As outlined above, this approach ensures that the federal sentencing guidelines are afforded the appropriate consideration, determination and ultimately, the proper weight to which they are due under *Booker*. The sentencing guidelines embody all of the applicable sentencing factors for a given offense and offender. The Commission believes that the three-step approach to sentencing is consistent with the *Booker* remedy.

Second, the Commission believes that any legislative response to *Booker* should address the appellate review process and standard.

Third, as the Commission has noted throughout this testimony, timely and uniform use of sentencing documentation is imperative to the Commission's ability to accurately ascertain and report about national sentencing practices. Any legislative response should include the continued importance of proper and uniform sentencing documentation being sent to the Commission.

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[51] *Booker*, 543 U.S. at 265.

Fourth, the Commission believes that a legislative response should clarify that a sentence reduction for cooperation or substantial assistance is impermissible absent a motion from the government.

The Commission is considering holding its own *Booker* hearings.

The Commission stands ready to work with Congress, the Judiciary, the Executive branch, and all other interested parties in refining the federal sentencing system so that it preserves the core principles of the bipartisan Sentencing Reform Act in a constitutionally sound manner that would lessen the possibility of further litigation of the system itself. Such an approach would be the best for the federal criminal justice system.

Mr. Chairman, Ranking Member Scott, and Members of the Committee, thank you for holding this very important hearing. I will be glad to answer any questions you may have.